IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1397

JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., Individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from an order of the United States District Court for the Southern District of New York entered on January 28, 1976, which declared unconstitutional New York Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 on their face and further enjoined the operation of the statutes as against appellees and members of their class. Further the injunction was ordered applicable retroactively as well as prospectively. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

Opinion Below

The opinion of the District Court granting appellees' application to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 is reported below at 387 F. Supp. 630 (S.D.N.Y. 1975).

The opinion and order, later modified, of the three-judge court declaring the statutes involved unconstitutional and granting to plaintiffs and members of their class a permanent injunction is not yet reported. It is reproduced herein as Appendix "A" (1a).*

A separate opinion granting class action status is reproduced as Appendix "B" (17a).

Jurisdiction

This action was brought pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, to declare unconstitutional and enjoin New York Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 which are part of Article 19 dealing with contempt. The original opinion and order was entered January 7, 1976 (Appendix "A", (1a)). The order was modified and replaced by an order entered January 28, 1976. The defendants appealing filed their notice of appeal February 6, 1976. Copies of the later order and the notice of appeal are reproduced herein as Appendices "C" (19a) and "D" (21a).

The jurisdiction of the Supreme Court to review the decision and order herein is conferred by 28 U.S.C. §§ 1253 and 2101(b).

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* Numbers in parentheses followed by "a" refer to Appendix herein.

Statutes Involved

New York Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 (McKinney's Book 29). These provide a procedure for punishing civil contempts as defined in Judiciary Law § 753. The statutes invalidated are reproduced within App. "A", the opinion of the Court below (10a-14a).

Briefly summarized the statutes dealing with contempt arising from the failure to comply with the order of the court:

(1) § 756 provides that where the offender has failed to pay a specific sum of money an *ex parte* order may issue committing the person until the money is paid or he is discharged according to law. (This was provided for in the fining order issued here after the respondents failed to appear on the order to show cause).

(2) § 757 provides for either an order to show cause or a warrant of attachment to bring the case before the (state) court. (The latter, subd. 1 would result in arrest before any adjudication. It was not used herein).

(3) § 770 provides for a final order if the accused has committed the offense and must be punished by fine or imprisonment. (A special procedure is provided for Domestic Relations Law § 245 and other matrimonial orders for payment of alimony or counsel fees.)

(4) § 772 simply provides for decision of the order to show cause and punishment as in § 770.

(5) § 773 provides for a fine to indemnify the aggrieved party. If actual loss is not shown, a fine must be imposed not exceeding costs and expenses plus $250.

(6) § 774 provides a limit to imprisonment. For a fine of under $250, the limit is three months; if

more, six months. Also there is a provision that the offenders must be brought before the court within 90 days, if imprisoned for an indeterminate term or more than three months. Notice is provided for.

(7) § 775 provides that where the offender cannot endure the punishment or pay the money or perform the act, the court may discharge the offender.

Questions Presented

1. Was the District Court correct in concluding that abstention, due to the pendency of state court proceedings and their nature, was not applicable to the instant action brought against the state judges?

2. Are the several sections of New York's Judiciary Law unconstitutional *on their face* because

(a) they allow an adjudication of contempt without an actual hearing (based on default in appearance of order to show cause).

(b) § 757 does not require notice of the possible results of non-appearance at the show cause hearing other than the person served will be in contempt?

(c) §§ 756, 770, 772 and 774 do not require informing the alleged offender of his right to counsel (or assigned counsel if indigent)?

(d) the fine and alternatively incarceration permitted under §§ 756, 770, 773 and 774 are deemed punitive and is paid to the judgment creditor?

3. Was this a proper class action?

4. Did the District Court err in granting partial summary judgment when the only motions before it was for a preliminary injunction and a cross motion to dismiss?

5. Did the District Court err in giving retroactive application to its judgment?

Statement of the Case

The District Court ultimately granted partial summary judgment declaring seven cited sections of New York's Judiciary Law unconstitutional on their face on the basis of a "typical" case of the named plaintiff. Harry Vail suffered a default judgment ($534.36) in the City Court of Poughkeepsie, Dutchess County, New York. Then in proceedings supplementary to the judgment, he was served with a subpoena by the attorney for the judgment creditor to appear for a deposition relative to an examination of his assets which might be available to satisfy the judgment. Vail did not appear.*

Thereafter on the basis of the default and in accordance with New York law, upon application of the attorney for the judgment creditor, Vail was ordered to appear to show cause why he should not be punished for contempt for his failure to appear. Appellant Judge Juidice signed this order to show cause. Vail was served with this order to show cause.

When Vail disregarded this order and once again failed to appear in court, Judge Juidice signed another order imposing a fine ($250 plus $20 costs), payable to the judgment creditor (Public Loan Company) in reduction of the judgment. It apparently provided that if the fine was not paid within 30 days, upon proof of due service, an order might issue *ex parte* directing the Sheriff to take Vail into custody.** In Vail's case this occurred. He was released the next day upon payment of the fine.

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* The subpoena pursuant to N. Y. Civil Procedure Law and Rules (CPLR) 5223 must state that: "failure to comply with the subpoena is punishable as a contempt of court," must be served at least 10 days before its return date (CPLR 5224) and upon any examination if the person subpoenaed does not understand the English language that "the judgment creditor shall, at his own expense, provide a translation of all questions and answers."

** The form of the order should be same as in the case of Patrick Ward, another appellee whose order of contempt was annexed to the original papers granting temporary restraining order in the District Court.

The above recitation is based on the District Court's version of the facts which, in turn, was based solely on affidavits submitted by appellees and their attorney. These were submitted in support of their motion for a preliminary injunction. They also alleged indigency. (Obviously if any judgment debtor is indigent the examination in supplementary proceedings would be non-productive to the judgment creditor. Furthermore, if such fact is pointed out to the court, such debtors as appellees would be released from any civil imprisonment.) It should be noted that there were numerous other situations before the Court below, some of which did not involve even alleged indigency—i.e. the appellees could pay the fine.* Indeed, for the most part, they paid the fine.

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* Briefly, the contentions were and this is not to concede the absence of any factual issues, as the defendants were moving to dismiss and plaintiffs never established these allegations in state court to oppose contempt. Thus appellant Judges could have no basis to controvert these claims, although they have never been properly established in any evidentiary hearing in a court, state or federal.

(1) Patrick Ward owes a state court judgment of $146.84. He failed to appear at a subpoena examination, in response to an order to show cause, or pay a fine imposed. He was subject to commitment for his failure. (Compl. ¶'s 43-61)

(2) Richard McNair owes a judgment of $362.42. He failed to appear at a subpoena examination, respond to an order to show cause, or pay a fine ($293.75) imposed. He was jailed for five hours, paid the fine on money from "rent", and money his wife borrowed from her credit union. It is significant that the judgment was for services rendered to plaintiff McNair's wife. While he contends he is "indigent", he had the resources to pay the fine ["rent" money and borrowing], a substantial portion of the judgment. (Compl. ¶ "74").

Thereafter another plaintiff was added in this action:

(3) James Hurry owes a judgment of $90.43. He, too, ignored all suplementary proceedings to examine him as to his assets and the order to show cause to punish him for contempt. He ignored the finding order. Warned by the Sheriff

(footnote continued on following page)

Prior Proceedings

On institution of the action, the appellees obtained temporary restraining orders in the district court enforceable against the appellant Judges against their commitment to jail based on the state court orders of contempt, thereby circumventing the state court proceedings. District Judge Cannella ordered the convening of a three-judge court, 387 F. Supp. 630 (S.D.N.Y. 1975).

(footnote continued from preceding page)

that he would be committed January 2, 1975 he intervened in the instant action. While he claimed many debts, he did not claim indigency and contended (¶ 14, Aff., Dec. 31, 1974) that he "refuses to pay the fine because he maintains that Defendant Redl never properly repaired his car." Thus failure to pay was not because of any indigency.

Then four more plaintiffs were permitted to intervene in the action:

(4) Leslie Nameth owes a judgment of $69.82. His situation is quite similar to Hurry. He ignored all legal process and notices. He, too, asserted that he "refused to pay the fine because he maintains that Defendant Redl did not give him a proper credit on the towing charges . . ." (Aff. Jan. 7, 1975, ¶ 11) This failure to pay was not because of any indigency.

(5) McKinley Humes owes a judgment of $233.84. He, too, ignored all legal process and notices. He faced the *danger* of imprisonment. He had never appeared in state court.

(6) Joanne Harvard owes a judgment of $413.40. She ignored all legal process and notices, was arrested and committed for nonpayment, at which time she promptly paid the fine, allegedly through a "loan" from her mother. She asserted she has been threatened with commitment again. She asserts she has no money to make installments payments on her outstanding judgment. However no legal proceedings in state court were ever instituted.

(7) Joseph Rabasco was under a court order to make support and mortgage payments to his wife. He defaulted, allegedly after losing his job, and stated he was on unemployment insurance. His wife sought an order of contempt. Of all the plaintiffs below, Rabasco alone appeared in court on

(footnote continued on following page)

The three-judge court, after hearing her motion for a preliminary injunction and the state defendants' motion to dismiss, declared the several sections of New York Judiciary Law unconstitutional and enjoined further application. In a separate memorandum and order District Judge MacMahon granted class action status. On appellants' order to show cause to resettle the order and for a stay, the court changed the order, making the declaration of unconstitutionality retroactive and stating that the order was for "partial summary judgment", and failing to accord a stay to the appellants (19a).

(footnote continued from preceding page)

the hearing. He allegedly asked Justice Grady, presiding there, to assign a lawyer. While it was asserted Justice Grady "refused", the Justice did adjourn the case from January 6, 1975 to an unspecified date so that Mr. Rabasco could retain a lawyer. It was stated private counsel wanted a $500 to $1,200 retainer. Mr. Rabasco did retain Mid-Hudson Valley Legal Services as his attorney. Within two days it had drawn up the affidavit for this action. Thus to claim Mr. Rabasco was refused counsel is absurd. His hearing was adjourned and he retained an attorney.

(8) Richard Russell owes a judgment of $932.11 on a lease he broke. The usual defaults occurred. On January 30, 1975, pursuant to a commitment order of *March 8, 1974*, he was arrested and committed for non-payment of his fine. The *same day*, he paid his fine ($289.95) allegedly on money his father lent him. (Aff., ¶ 15, February 13, 1975).

(9) Helen Thorpe owed a judgment of $112.75 to Redl, an auto shop. The usual defaults occurred. She was arrested and committed, for *three hours*, when her nephew allegedly loaned her $139.63 and her fine was paid (Aff. ¶ "12", February 13, 1975).

(10) Robert H. Harrel and his wife Evella owes a judgment for medical services. While Mr. Harrel is purportedly to have intervened, there was no indication he has ever retained the attorneys herein. He had left home before the motion for intervention. While he was committed two times, for a total of *six hours*, each time his mother, brother or sister lent him the money to pay the fine and he was immediately released. As Mrs. Harrel did not know his whereabouts, we doubt if this was a real case or controversy.

Appellants then applied to Mr. Justice Thurgood Marshall, for a stay of judgment. Justice Marshall granted the stay on February 12, 1976 (23a). Reproduced as Appendix E (23a). An application by appellees for modification of the stay was denied March 1, 1976.

The Questions Presented On This Appeal Are Substantial

1. The District Court Erred In Not Applying The Doctrine Of Abstention For Reasons Of Comity And Federalism.

The every concept of a federal court assuming jurisdiction in this action against the appellant Judges to review these state court orders strikes at the heart of basic principles of equity, comity and federalism. The appellees should have been relegated to the state court to pursue their grievance. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). In extending *Younger* v. *Harris*, 401 U.S. 37 (1971) to civil proceedings, *Huffman* might very well be limited to those civil proceedings "more akin to a criminal prosecution than most civil cases." 420 U.S., at 604. The proceeding in contempt are akin to a criminal prosecution for purposes of *Huffman*, as it can result in the offender being fined or jailed upon non-payment of the fine. Contrary to the court below (ftn. 14) the statute, Judiciary Law § 753 does not define civil contempt as "civil", it simply describes acts which constitute "civil contempt". While instituted by a private litigant, civil contempt has been defined as quasi-criminal or semi-criminal. Numerous cases in New York support the quasi-criminal nature of civil contempt. *Matter of Carlson* v. *Podeyn*, 12 A D 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961); *Dwyer* v. *Town of Oyster Bay*, 28 Misc. 2d 952, 217 N.Y.S. 2d 392 (Sup. Ct., Nassau Co., 1961) ("semi-criminal"). That the contempt is quasi-criminal because it may result in fine or imprisonment does not alter its remedial character. *Croma Glass Corp* v. *Ferm*, 500 F. 2d 601 (3d Cir. 1974); *U. S.*

Steel Corp. v. *United Mine Workers,* 393 F. Supp. 942 (D. C. Pa. 1975).

It is clear that even if a commitment is denominated "civil", *Huffman* v. *Pursue, Ltd.,* warrants abstention. See *Schmidt* v. *Lessard,* 421 U.S. 957 (1975), vacating and remanding *Lessard* v. *Schmidt,* 379 F. Supp. 1376 E.D. Wisc. 1974).

Given the fact that the appellees never appeared before appellants, although served with notice, it was a flagrant breach of federalism to hold that state court judges violated the constitutional rights of people who never appeared in court. This Court has said, *Rizzo* v. *Goode,* —— U.S. ——, 46 L.Ed. 2d 561, 574-575 (1976), that principles of federalism (and abstention) have not been limited to criminal proceedings.

The appellees could not ignore state court orders. Regardless of the constitutional issues, they had to obey those orders and not bypass orderly judicial review (in the state court) by instituting a federal action. *Walker* v. *City of Birmingham,* 388 U.S. 307, 319 (1967); *Maness* v. *Meyers,* 419 U.S. 449, 458 (1975).*

2. The District Court Simply Substituted Their Own Untenable Views In Declaring The Several Statutes Unconstitutional On Their Face On The Grounds Cited Thereby Upsetting The State Proceeding Supplementary To Judgment.

It should be abundantly clear that the declaration of facial unconstitutionality of Judiciary Law §§ 756, 757, 770,

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* It also should be noted that New York law is not as clear as the court below thought (4a). Abstention to obtain a state interpretation of the contempt hearing procedure would also be required. *Carey* v. *Sugar,* —— U.S. ——, 44 L.W. 4416 (Mar. 23, 1976). *Carey, id.* 4417, also supports the proposition that failure to present the federal claims in state court warrants abstention. *Cf.* Opinion below (4a).

772, 773, 774 and 775 raises a substantial issue.* Besides the fact, recognized by the court below, that a hearing is provided by the statutes (7a)**, the basic constitutionality of the contempt procedure in New York has been upheld by the Second Circuit, holding that a challenge did not even present a substantial constitutional question and thus did not require a three-judge court. *Agur* v. *Wilson,* 498 F. 2d 961, 967 (2d Cir. 1974) *cert. den.* 419 U.S. 1072, *reh. den.* 402 U.S. 939. The statutes are procedural and simply evocative of the power of a court to punish civil contempt. *On their face* they provide for notice and an opportunity to be heard, the hallmarks of due process.

As in *Agur, supra* (at 967) one cannot doubt every appellee here was given the opportunity for a hearing on the merits if exercised. No valid excuse was given for non-participation. To that extent the appellees can be deemed to have waived the hearing and have no due process or equal protection claim. *Boddie* v. *Connecticut,* 401 U.S. 371, 378-379 (1971).

On each of the grounds cited in the opinion of the district court, the court below was erroneous in declaring the several sections of the Judiciary Law unconstitutional *on their face.* We take them up seriatim.

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* It is doubtful that any state lacks a statute on civil contempt of court. They are basically drafted in the same way as New York's. Thus the opinion below casts in doubt literally dozens of state statutes. Eg. (1) Burn's Ind. Ann. Stat. 34-4-7-1 *et seq.;* —9 makes clear if defendant fails to answer, attachment and punishment issue. (2) Mich. Compiled Law Ann. (1968), 600.1701-1745; 600.1715 provides for $250 fine. (3) Minn. Stat. Ann. Ch. 588 (1947); 588.10 provides for punishment of $250. (4) 27 Page's Ohio Rev. Code, 2705.01; .03 (hearing by self or counsel; .05 (trial and punishment). (5) Ore. Rev. Stat. § 33.010, .110 (1974); see .020 ($100 fine); .140 (non-appearance). (6) Tenn. Code Ann. § 23.901 (1956); .903 ($50 and 10 days). (7) Utah Code Ann. § 78-32-1 (1953). See also, 18 U.S.C. § 401(3).

** "It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable." (7a).

A. Permitting Adjudication Of Contempt Without An Actual Hearing

Besides the still valid holding that due process does not require additional notice to a judgment debtor who had had his day in court before judgment was rendered, *Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), the law also is clear that due process does not require the actual presence of the alleged offender in a contempt proceeding. If the notice served is sufficient to inform him of the character of the charge against him and of the hearing at which he would have an opportunity to present his defense, due process is provided. *Blackmer* v. *United States*, 284 U.S. 421, 443 (1932).*

The requirement of an *actual* hearing carried to its logical extreme would require the state court to *ex parte* issue a warrant to arrest and bring into court every person simply accused of civil contempt. This procedure is allowed as an alternative procedure under Judiciary Law § 757(2), which in its sweeping opinion, the district court also declared unconstitutional. *Cf. Blouin* v. *Dembitz*, 367 F. Supp. 415, 420 (S.D.N.Y. 1973), affd. on other grounds (abstention), 489 F. 2d 488 (2d Cir. 1974). If the alternative were mandated thousands of alleged offenders would be arrested to insure their presence in court.

B. Failure Of The Notice To Recite That A Failure To Respond May Result In Imprisonment

At the outset it must be noted that none of the statutes involved specify the form of notice or the wording of the order to show cause. The statute does provide for language in the show cause order why the person served should not be "punished for the alleged offense" (§ 757, subd. 1). The statute on its face does not prohibit notice

* The court below's citation of *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 251 (1972) and *Harris* v. *United States*, 382 U.S. 162, 167 (1965) is wide of the mark. Both cases involve incarceration without an *opportunity* for a hearing.

of the penalty consequences of not appearing in response to the order to show cause. But the type of notice specifying the time and place for the hearing and the offense charged to be personally served fully satisfy due process. It is only when the person served is under some special disability that due process might require better notice. *Covey* v. *Town of Somers*, 351 U.S. 141, 146-147 (1956). The district court imported as a due process requirement that the notice *must* include notice of penalty and that the failure to mandate such notice was fatal to the statute. The district court simply imposed its own personal view as to the due process requirement without any factual evidence to support such imposition.

Certainly the cases the court below relied on fail to support this stricture. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (ftn. 20, 16a) deals with notice of service by publication, not the contents of the notice. The contempt proceedings herein were brought on by personal service of an order to show cause. The case of *Lynch* v. *Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) involves persons alleged to be under a mental disability.* The instant case obviously involves persons of sound mind who are capable of understanding the meaning of "contempt".

C. Right To Counsel

Although the court below does not clearly say so, its opinion appears to mandate that the alleged offender must have counsel assigned if indigent. The statutes do not deny appellees the assistance of counsel upon request and the question is open. Curiously, the court below engaged here in the illogical process of treating the civil con-

* To this extent *Lynch* is similar to *Covey, supra.* Furthermore *Lynch*, apparently unappealed, cites *Lessard* v. *Schmidt, supra. Lynch* clearly would be subject to abstention, *Huffman* v. *Pursue, Ltd.*, on authority of *Schmidt* v. *Lessard, supra*, 421 U.S. 957.

tempt process as criminal, while in discussing absention it treated the state proceeding as civil.

Indeed it was never established that the appellees were, in fact, indigent. Since the appellees did not appear in response to the order to show cause the subject obviously never arose. *Cf., Argersinger* v. *Hamlin,* 407 U.S. 25, 26 (1972).*

D. The Punitive Nature Of The Fine

The court below held to the view that the fine of $250 payable to the judgment creditor for his damages for the non-appearance was violative of due process. This, of course, only involves § 773, which permits such a fine not in excess of $250 in the absence of any other proof of damage.

This sum is the maximum, *Stewart* v. *Smith,* 186 App. Div. 755, 175 N.Y.S. 468 (1919); *Stark* v. *Kessler,* 277 App. Div. 1122, 100 N.Y.S. 2d 872 (1950). The maximum is not so disaproportionate to the contempt as to be condemned on due process grounds. *Sunbeam Corp.* v. *Golden Rule Appliance Co.,* 252 F. 2d 467, 470 (2d Cir.). The payment of the fine to the judgment creditor is in accord with the authorities. *United States* v. *Mine Workers,* 330 U.S. 258, 304 (1947); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911); *Atlas Corp.* v. *DeVilliers,* 447 F. 2d 799, 803 (10th Cir. 1971), *cert. denied* 405 U.S. 933, *reh. den.* 405 U.S. 1033.

In addition, the holding below mandating the necessity of a hearing as to the imposition of penalty even upon non-appearance in response to the order to show cause ap-

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* Analogously an appeals court in New York in a similar situation has ruled that persons faced with civil contempt for failure to pay support are to be advised of their right to counsel and have it assigned if indigent. *Rudd* v. *Rudd,* 45 A.D. 2d 22, 356 N.Y.S. 136 (4th Dept. 1974). But *cf. Gagnon* v. *Scarpelli,* 411 U.S. 778, 788-791 (1973). See also *Middendorf* v. *Henry,* —— U.S. ——, 44 L.W. 4401, 4404-6, 7 (Mar. 23, 1976).

pears to be at odds with this Court's recent decision in *National Coal Operators' Ass'n.* v. *Kleppe,* —— U.S. ——, 46 L.Ed. 2d 580. There this Court said (*id.* at 587-588) that any requirement for a hearing must be keyed to a request by the mine operators. The statute there involved provided the mine operators with no more than an "opportunity" for a hearing. "When no request for a hearing is made, the operator has in effect voluntarily defaulted and abandoned the right to a hearing and findings of fact on the factual basis of the violation and the penalty." (*id.* at 589). In the instant case the appellees had the "opportunity" also.

New York's procedure in the enforcement of the order to show cause is upon a resonable basis. The adoption of the procedure applicable to applying civil contempt to supplementary proceedings under C.P.L.R. 5251 (1963), was explained in 6 Weinstein-Korn-Miller, *New York Civil Practice,* § 5251.02, as due to the deficiencies of the prior law (N. Y. Civil Practice Act). Cited was the "notorious disregard for court orders and process relating to the enforcement of judgments . . .", 52-745. To quote (52-746):

> "Even when the Civil Practice Act provided sanctions, they frequently were ignored in practice and the violator merely ordered to do what he initially was supposed to do, with no additional penalties being imposed. Thus, although failure to appear for an examination pursuant to a subpoena or court order was punishable as a contempt, judgment debtors learned that they could willfully flout the order of subpoena; for upon their appearance pursuant to an order to show cause, courts almost invariably required only submission to the examination."

Provisions for relief from imprisonment are provided. 9 N.Y. Jur., *Contempt,* § 66, pp. 393-394. *It must be emphasized that appellees never sought to excuse their fail-*

ure to pay the fine in the State court or claim they were unable to do so. Therefore, so far as the record in the State court showed, the appellees were fined and failed to pay; there is no showing they could not pay. Indeed, as we have pointed out, the fines were immediately paid in all cases of imprisonment.

As the *Atlas* case (447 F.2d at 803) shows the imprisonment is not for debt and, in fact, New York has a long standing policy against enforcing money judgments by contempt based on the belief that the use of contempt sanction under such circumstances would be tantamount to imprisonment for debt. 6 Weinstein-Korn-Miller, § 5251.03. See also *Matter of Reeves,* 274 N.Y. 74, 79, 8 N.E. 2d 283, 111 A.L.R. 389.

It is patent that in every respect, the District Court was attempting with one fell swoop to rewrite the established law dealing with procedures supplementary to judgment without any record to support its strictures. Cf. *Lindsey* v. *Normet,* 405 U.S. 56, 58, against "federalizing" the law of landlord and tenant.

3. Class Action Relief Was Not Proper.

In a separate memorandum, Judge MacMahon, as a single judge, granted class action relief pursuant to Rule 23, Federal Rules of Civil Procedure. By creating a class consisting of all persons who have been, or presently are, subject to civil contempt proceeding the order went way beyond the parameters of the case before it.

Thus it covered persons represented by counsel, able to pay the fines, completely aware of the consequences of contempt, those fined to compensate the judgment creditor in sums greatly above any punitive fine of $250. While it can be conceded all persons subject to civil contempt have an interest in not being held in contempt, it is doubtful a federal court, with any awareness of equity, federalism and comity, should entertain such base desires.

The memorandum confused the case by lumping into the class the whole spectrum of contempt offenders without any reasonable basis. Its pervasive effect was shown by the decision of the local sheriffs not to execute any contempt fine orders in matrimonial non-support cases until the stay order was issued by Justice Marshall. See N. Y. Law Journal.

4. The Court Below Erred In Determining The Merits With A Final Injunction Without A Trial.

The procedure followed by the District Court also presents a substantial question for review. The court below granted a final judgment against the constitutionality of the several statutes in favor of appellees, without a trial. At the time this action came before the court the appellees were moving for a preliminary injunction and the appellants were moving to dismiss. The appellees made no request to the court below (by way of motion) for final or even partial summary judgment. The appellees had not answered, but only moved to dismiss. Yet, the District Court granted a declaratory judgment and a permanent injunction, striking down numerous State statutes without a trial of the necessarily disputed issue of indigency the Court itself found material, and without any procedural safeguards such as a Federal Rules of Civil Procedure 56 summary judgment motion.

The particular vice of course is that the District Court assumed as facts the allegations of the complaint and statements in affidavits as a basis for a final judgment of unconstitutionality. Thus, the District Court decided that all the appellees were indigent,* decided that every inference would be in favor of appellees and, in general, denied appellants herein their procedural rights guaranteed by the Federal Rules of Civil Procedure. In so

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* Our brief below showed, on appellees' own affidavits, some plaintiffs were not indigent, but simply would not accept the judgment of the state court. (See also, ftn. p. 6)

doing the District Court acted contrary to the law in its own Circuit, even where there are motions for summary judgment from all parties. *Rhoads* v. *McFerran*, 517 F. 2d 66 (2d Cir. 1975).* Obviously, the question of indigency, notice, amount of fines had never been presented to the state courts, but the federal court, without a hearing, solely on affidavits and without a motion to go to final judgment decided all issues.

5. The Retroactive Nature Of The Judgment Is In Defiance Of Established Authorities

The making of the judgment retroactive to all state court contempt proceedings in the state of completion was in defiance of *res judicata* and unsupportable on the record before the District Court. The final judgment swung its sword retroactively as well as prospectively. It wiped out thousands of civil contempt orders in New York without regard to the effect on the administration of justice in New York. It certainly laid out new standards for an entire body of law in New York. This was in utter contradiction the principle of *res judicata* applicable in each of the completed contempt proceedings.

Furthermore, even in clearly criminal cases, retroactive application of a decision must be based on certain factors; (1) purpose to be served by the new standards (2) the extent of the reliance by public officials on the old standards (3) effect on the administration of justice of a retroactive application of the new standards. *Daniel* v. *Louisana*, 420 U.S. 31 (1975). Even in the exercise of proper judicial discretion, the court below could not justify giving retroactive effect to its declaration of unconstitu-

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* A three-judge statutory District Court is bound by the law applicable in its District and Circuit. *Sunshine Anthracite Coal Co.* v. *Adkins*, 31 F. Supp. 125, 127 (E.D. Ark. 1940), aff'd 310 U.S. 381 (1940).

tionality. Regardless of whether the new standards are correct they should have only operated prospectively. What its massive effect will be if not set aside is impossible to estimate at this time.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted and the judgment reversed.

Dated: New York, New York, March 25, 1976.

Respectfully submitted,

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APPENDIX A

Opinion (and Order) of Three Judge Court. Vail, et al. v. Quinlan, et al. (S.D.N.Y. 74 Civ. 4773).

MacMahon, *District Judge*

This three-judge court has been convened, pursuant to 28 U.S.C. § 2281, to hear and determine this action, brought under the Civil Rights Act and its jurisdictional counterpart, 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), by individual judgment debtors and all others similarly situated. Challenging the constitutionality of certain statutes of the State of New York, plaintiffs seek class action determination[1] and money damages, as well as declaratory and injunctive relief.

The challenged statutes, Sections 756, 757, 765, 767, 769-775[2] of Article 19 of the New York Judiciary Law (McKinney 1968), implement supplementary or post-judgment proceedings for collection of money judgments. They permit a judgment debtor, who has failed to comply with a disclosure subpoena concerning his ability to satisfy a judgment debt, to be held in contempt, fined and imprisoned without a hearing.

We hold that certain of the statutes in question, specifically, Sections 756, 757, 770, 772, 773, 774 and 775, violate the due process clause of the Fourteenth Amendment and accordingly that they are void and may no longer be enforced.[3]

Statutory Scheme

A creditor, unable to satisfy a money judgment, may compel a judgment debtor to disclose all matter relevant to satisfaction of the judgment.[4] Disclosure is generally effected by requiring the debtor, in response to a subpoena issued by the creditor, to attend a deposition or to supply information by answers to written questions submitted by

the creditor.[5] False swearing or failure to comply with the subpoena is punishable as a contempt of court.[6]

Procedures by which a debtor is held in contempt are set out in the Judiciary Law and constitute the statutory scheme challenged here. If the debtor does not comply with the disclosure subpoena, an order requiring him to show cause why he should not be punished for contempt will issue solely upon the basis of an affidavit by the creditor's attorney showing that the debtor failed to respond to the subpoena (§ 757(1)). If the debtor does not appear for a hearing upon the return date of the order to show cause, the court will make a final order directing that he be punished by fine or imprisonment (§§ 772, 770). The fine is in an amount sufficient to indemnify the creditor for any loss or injury caused as a result of the debtor's contempt, or, if no loss or injury is shown, in an amount not exceeding costs plus $250 (§ 773).

On the basis of an affidavit of the creditor's attorney showing that a demand for payment of the fine has been made and refused, an *ex parte* warrant is issued committing the debtor to prison until the fine is paid (§ 756). The debtor may remain incarcerated for up to 90 days before he is brought before the court for a review of the proceedings and a determination as to whether he should be discharged from imprisonment (§ 774). If the debtor is unable to endure the incarceration or to pay the sum of money, he may petition the court for release (§ 775), but the burden of proof is on the debtor to show why he should no longer be held.[7]

The case of the plaintiff Vail is typical of the plight of the judgment debtor under the challenged statutory scheme. Vail and his wife were the subject of a default judgment for $534.63 entered in favor of Public Loan Company in January 1974. At that time, Vail and his family were on public assistance. On April 22, 1974, Charles Morrow,

attorney for Public Loan, caused a subpoena to be served on Vail, requiring him to appear on May 28 before Charles Morrow for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment. Vail did not appear for the deposition.

On the basis of the subpoena, an affidavit of due service, and an affidavit by Charles Morrow that Vail did not appear and that his conduct was calculated to and did actually defeat, impair and prejudice the rights and remedies of the judgment creditor, Judge Joseph Juidice of the Dutchess County Court issued an order on July 22 directing Vail to appear at the Dutchess County Court on August 13, to "show cause why he should not be punished as for contempt for violation of and noncompliance with the said subpoena in that he failed to appear or respond thereto." When Vail did not appear in County Court, Judge Juidice issued an "Order Imposing Fine," which held Vail in contempt and required him to pay $270 to the judgment creditor.

When Vail failed to comply[8] with the Order Imposing Fine, Charles Morrow, on the basis of the papers previously submitted on the application for the order to show cause, an affidavit of due service of the Order Imposing Fine, and an affidavit of Morrow that Vail had not complied, applied for and obtained an *ex parte* commitment order on September 23. The commitment order directed that, without further notice, the sheriff of any county arrest Vail and commit him to the county jail, that he be held in custody until the fine of $270 was paid, together with the sheriff's fees and the disbursements on the execution of the order.

Vail was arrested in his home on October 1 and committed to the Dutchess County Jail. At the time, he had only one dollar to last him until he received his next public assistance check. He and his family owned no property

except household furniture and clothing. Vail was released the next day when a relative loaned him $294.25 to pay the fine plus additional costs.

ABSTENTION

A preliminary question for determination is whether we should abstain from deciding the issues raised in this action. Plaintiffs never raised their constitutional claims in state court, although the challenged statutory scheme does provide an opportunity for a hearing. Defendants contend that federal intervention before the state has an opportunity to construe its own laws is an untenable interference with the duty and authority of the state courts to enforce their judgments. Further, defendants cryptically assert that, even if no appeal is available from any or some of the orders of the defendant judges, a debtor in plaintiffs' posture must still exhaust his state appellate remedies.[9]

Abstention is a judge-made doctrine based on considerations of federalism and a need to avoid premature constitutional adjudication. It allows a federal court, although having jurisdiction, to decline decision on the merits of the controversy. The doctrine is invoked when determination of a state law issue may resolve or materially alter the constitutional claim.[10]

Defendants first contend that since the issues raised here have never been presented to a state court, interests of comity and federalism warrant dismissal of the action. It is clear, however, that when the challenge is to the constitutionality of statutes which are not ambiguous, abstention should not be used to require vindication of a federal claim in state court.[11]

The method by which the civil contempt provisions are implemented cannot be in doubt, for each of the representative plaintiffs has been subjected to these statutes.

The challenged statutes were originally enacted in 1909. They are not ambiguous on their face; nor have defendants suggested a limiting construction by which a state court could resolve the constitutional claim. We think, therefore, that we should not decline to reach the merits of this case under the traditional formulation of the doctrine of abstention.

More forcefully, defendants contend that the abstention doctrine articulated in *Younger* v. *Harris*, 401 U.S. 37 (1971), should bar this action. In *Younger*, the Supreme Court held that considerations of comity and the reluctance of equity courts to interfere with criminal prosecutions prevented a federal court from intervening by way of an injunction or declaratory judgment in a criminal prosecution pending in state court. *Younger* was expanded in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), to apply to a civil proceeding brought under a state's nuisance statute to enjoin exhibition of obscene films.

Huffman did not extend *Younger* to apply to all pending state court actions. The Supreme Court characterized the nuisance proceedings as "more akin to a criminal prosecution than most civil cases."[12] In *Huffman*, the state was a party to the proceedings because the action had been brought by the county prosecutor. Enforcement of the nuisance statute was found to be in aid of, and closely related to, criminal statutes which prohibited the exhibition of obscene materials. The Court, therefore, held *Younger* to apply to civil proceedings only when intervention would disrupt the very interests which would underlie a state's criminal laws.

In *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427 (2d Cir. 1975), the question was whether intervention in a state disbarment proceeding was comparable to the disruption in *Huffman*.[13] The court found that it was, noting the characterization of the pro-

ceedings as quasi-criminal and the state's special interest in controlling the fitness and character of members of the bar.

When the circumstances of the instant case are measured against *Huffman* and *Anonymous,* it is clear that they do not fit within the limited extention of *Younger*. The challenged statutory scheme is designed to facilitate a creditor's collection of a judgment debt. The civil contempt proceedings are initiated by private parties to enforce compliance with subpoenas issued by private attorneys. They are not related to New York's criminal statutes; nor do they play any part in the enforcement of the state's criminal laws. Moreover, the challenged proceedings are defined as civil by the Judiciary Law.[14]

It is also a predicate for *Younger* dismissal that the parties have an opportunity to raise and have their federal issues decided by a competent state tribunal.[15] Under Article 19 of the Judiciary Law, a debtor who fails to appear at the show cause hearing may be found in contempt, fined and subjected to incarceration *ex parte* (§ 770). If the court merely imposes a fine which the debtor fails to pay on demand a warrant is issued ordering the debtor's imprisonment (§ 756). The challenged statutes, therefore, permit the debtor to be thrown in jail without an actual hearing on the basic issues of whether he has paid or is able to pay the fine, whether his assets were originally exempt from execution, or whether he ever received notice of the order to show cause or was otherwise notified of the hearing.

In *Gerstein* v. *Pugh,* 420 U.S. 103 (1975), the Supreme Court held that a federal court injunction against the detention of a criminal defendant on the basis of an Information did not violate principles of *Younger*. The Court distinguished between an injunction brought against a state criminal prosecution and one directed against in-

carceration without a preliminary hearing.[16] Since plaintiffs claim that the statutory scheme challenged here also permits incarceration without a preliminary hearing, *Younger* does not apply.

Constiutional Validity

Plaintiffs level four independent attacks under the due process clause against the statutory scheme supporting the civil contempt provisions of the Judiciary Law: (1) Sections 756, 757, 770, 773 and 774 permit an adjudication of contempt and order of imprisonment without an actual hearing; (2) Section 757 does not provide for adequate notice or warning of the consequences of failure to appear at the show cause hearing; (3) Sections 756, 770, 772 and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent; and (4) the fines and incarceration permitted under Sections 756, 770, 773 and 774 are punitive. Defendants contend that the notice and hearing provisions of the statutory scheme are sufficient under the due process clause. In examining these contentions, we recognize that the degree of procedural safeguard required by the constitution will be influenced by the importance of the private interest effected.[17]

It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable. However, if the debtor does not appear, he is adjudged in contempt and subject to a warrant of commitment. Due process requires more than the mere opportunity to be heard when the interest involved is deprivation of the debtor's liberty. The statutory scheme presently allows imprisonment solely on the basis of a creditor's affidavit of service and an *ex parte* proceeding. A finding of contempt can be properly made only upon a hearing with both parties present.[18] The de-

fect is not cured by providing a hearing within 90 days of incarceration. If a hearing is to serve its full purpose, it must be held before, and after, imprisonment.[19]

A concomitant to a fair hearing is notice appropriate to the nature of the case.[20] Here, notice must be complete and clear, given the substantial deprivation of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment.[21]

Moreover, the right to a hearing prior to imprisonment is ineffective without counsel.[22] The debtor cannot be expected to understand, much less to present, the legal and factual defenses to a finding of contempt that might be raised. Surely, a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime.[23]

Finally, although it is well established that judicial sanctions in civil contempt are proper to compensate the complainant for losses sustained or to coerce compliance with a court's order,[24] the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive. Where compensation is intended and a fine imposed, it must be based on evidence of the complainant's actual loss.[25] Section 773 requires the imposition of a fine up to $250 plus costs when the alleged contempt has not been shown to have resulted in any loss or injury to the creditor. If coercion is the purpose of the sanction, it can be justified only if the person has the ability to comply. The absence of the procedural safeguards of indictment and jury trial can be justified only by the conditional nature of the imprisonment and the contemnor's continued defiance.[26] Section 756 permits the arrest and incarceration of a debtor, whether or not he is able to comply with

the order by paying the fine. To the extent, therefore, that the fines and imprisonment contained in the Judiciary Law are punitive, they cannot be imposed in a civil contempt proceeding.[27]

Accordingly, under the due process clause of the Fourteenth Amendment, we declare unconstitutional and enjoin further application of Sections 756, 757, 770, 772, 773, 774 and 775 of Article 19 of the New York Judiciary Law.

So ordered.

Dated: New York, N. Y.
January 6, 1976

s/ .....
J. Edward Lumbard, U.S.C.J.

s/ .....
Lloyd F. MacMahon, U.S.D.J.

s/ .....
John M. Cannella, U.S.D.J.

Appendix A.

FOOTNOTES

[1] The certification of this action as a class action was made by Judge MacMahon, acting as a single district court judge, pursuant to 28 U.S.C. § 2284(5) and the limited three-judge court jurisdiction set forth by the Supreme Court. See *Hagans* v. *Lavine*, 415 U.S. 538, 543-45 (1974).

[2] § 756. Issue of warrant without notice

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

§ 757. Order to show cause, or warrant to attach offender

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court at which a contested motion may be heard.

§ 765. Execution of warrant when undertaking not given

If an indorsement is not made upon the warrant, as prescribed in section seven hundred and sixty-four; or if such an indorsement is made and an undertaking is not given, as pre-

Appendix A.

scribed in section seven hundred and sixty-six; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

§ 767. When habeas corpus may issue

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment can not be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

§ 769. Interrogatories and proofs

When the accused is produced, by virtue of a warrant, or a writ of habeas corpus, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers, and subsequent proofs, the court, judge, or referee must determine whether the accused has committed the offense charged.

§ 770. Final order directing punishment; exception

If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or be-

fore the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except where an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may in its or his discretion deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

§ 771. Punishment upon return of habeas corpus

Where the accused is brought up by virtue of a writ of habeas corpus, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff, or other officer.

§ 772. Punishment upon return of order to show cause

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

§ 773. Amount of time

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance

of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§ 774. Length of imprisonment and periodic review of proceedings

1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. If the term of imprisonment is not specified in the order, the offender shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more. If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine imposed is five hundred dollars or more in addition to the specified time of imprisonment.

2. In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be

held to determine whether such offender shall be discharged from imprisonment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from imprisonment, shall be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and further reviews of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. Where such imprisonment shall have arisen out of or during the course of any action or proceeding, the clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in such action or proceeding, at their last known address.

§ 775. When court may release offender

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

[3] In view of this conclusion, we do not reach plaintiffs' further contention that the statutes also violate the equal protection clause of the Fourteenth Amendment and the Fourth, Sixth and Eighth Amendments.

With regard to plaintiffs' claim for money damages, the doctrine of judicial immunity bars recovery against defendants Juidice and Aldrich, both judges of the Dutchess County Court. *Apton* v. *Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Hill* v. *McClellan*, 490 F.2d 859 (5th Cir. 1974); *Blouin* v. *Dembitz*, 489 F.2d 488 (2d Cir. 1973). Since there are no allegations of malice or bad faith regarding the conduct of defendant Quinlan, sheriff of Dutchess County, the damage claims against him must also be dismissed. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Tucker* v. *Maher*, 497 F.2d 1309 (2d Cir. 1974); *Fleming* v. *McEnany*, 491 F.2d 1353 (2d Cir. 1974). There being no evidence before us concerning the damages caused by the other defendants, we take no position with respect to the remaining claims for monetary relief.

[4] Section 5223, N.Y. CPLR.

[5] Section 5224, N.Y. CPLR.

[6] Section 5251, N.Y. CPLR, provides: "Refusal or wilful neglect of any person to obey the subpoena . . . shall . . . be punishable as a contempt of court."

[7] *Vought* v. *Vought*, 42 Misc.2d 16, 247 N.Y.S.2d 468 (1964); *In re Black's Estate*, 261 App. Div. 791, 28 N.Y.S.2d 130 (1941).

[8] Vail alleges that, at the end of August, he informed Public Loan that he could not make payments on the underlying debt because of his indigency, but that one of the creditor's employees told him "he would not have to appear in Court" if he made a payment of $5., which Vail did.

[9] Defendants brief, p. 12.

[10] *Kusper* v. *Pontikes*, 414 U.S. 51, 54-55 (1973); *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965).

[11] *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438-439 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 250-251 (1967); *Harman* v. *Forssenius, supra.*

[12] *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

[13] *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427, 432 (2d Cir. 1975).

[14] Section 753, Article 19, N.Y. Judiciary Law.

[15] *Huffman* v. *Pursue, Ltd., supra*, 420 U.S. at 594.

[16] *Gerstein* v. *Pugh*, 420 U.S. 103, 108 n.9 (1975).

[17] *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[18] *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 251 (1972); *Harris* v. *United States*, 382 U.S. 162, 167 (1965).

[19] *Fuentes* v. *Shevin, supra; Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970); *In re Harris*, 69 Cal. 2d 486, 446 P.2d 148 (1968).

A section providing that, upon arrest for failure to respond to an order to show cause, the sheriff must bring the debtor directly before the court, might pass constitutional muster if the show

cause order clearly advises the debtor that failure to respond might result in the issuance of a warrant for his arrest. *Cf. Non-Resident Taxpayers Ass'n of Pa. and N.J.* v. *Murray*, 347 F. Supp. 399 (E.D. Pa. 1972), *aff'd*, 410 U.S. 919 (1973); N.Y. Judiciary Law § 757(2).

[20] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

[21] See *Lynch* v. *Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three-judge court).

[22] *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[23] *Cooke* v. *United States*, 267 U.S. 517, 537 (1925); *United States* v. *Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972); *Abbit* v. *Bernier*, 387 F. Supp. 57, 62 n. 12 (D. Conn. 1974) (three-judge court); *In re Harris, supra.*

[24] *United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-304 (1947).

[25] *United States* v. *United Mine Workers of America, supra*, 330 U.S. at 304; *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-456 (1932).

[26] *McNeil* v. *Director, Patuxent Institution, supra*, 407 U.S. at 251; *Shillitani* v. *United States*, 384 U.S. 364, 370-371 (1966).

[27] *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911).

APPENDIX B

Class Action Memorandum. Vail v. Quinlan (S.D.N.Y. 74 Civ. 4773).

MacMahon, *District Judge*

Plaintiffs move, under Rule 23, Fed. R. Civ. P., for class action determination, seeking to represent all persons who have been, or presently are, subject to the civil contempt procedures contained in Sections 756, 757, 765, 767, 769-775 of Article 19 of the New York Judiciary Law (McKinney 1968). Plaintiffs challenge a statutory scheme that permits a judgment debtor, who has failed to comply with a disclosure subpoena concerning his ability to satisfy a judgment debt, to be held in contempt, fined and imprisoned without a hearing. Defendants oppose the motion on the ground that the plaintiffs are not representative of the class as a whole.

It is undisputed that all of the named plaintiffs are judgment debtors who failed to comply with a post-judgment disclosure subpoena issued by the attorney for his judgment creditor. Each was served with an order, issued solely on an affidavit, requiring him to show cause why he should not be adjudged in contempt for failure to obey the subpoena. Each failed to appear at the hearing on the order to show cause. Accordingly, each was held in contempt and, upon failure to pay the fine specified by the court, was incarcerated or subjected to an immediate threat of incarceration pursuant to an *ex parte* commitment order.

Plaintiffs allege that in Dutchess County alone, more than 500 persons have been subject to contempt proceedings under the challenged statutes. The numerosity requirement of Rule 23(a)(1) is, therefore, satisfied since joinder of so many individuals would be impracticable.[1] The common question of the constitutionality of the contempt procedures is sufficient under Rule 23(a)(2).[2] The

representational requirements of Rule 23(a) (3) are satisfied since each member of the class is, or has been, subject to the challenged statutes and to the same alleged deprivation of constitutional rights as the named plaintiffs. Finally, counsel has, and we believe will continue, to prosecute vigorously plaintiffs' claims.[3] This action can be maintained under Rule 23(b) (2) since defendants are alleged to have acted with respect to the plaintiff class as a whole, and relief of an injunctive or declaratory nature would settle the legality of defendants' acts with respect to all members of the class.[4]

Accordingly, plaintiffs' motion for class determination is granted. The class shall consist of all persons who have been, or are presently subject to the civil contempt proceedings contained in the challenged sections of the Judiciary Law.

So ordered.

Dated: New York, N.Y.
January 5, 1976

LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

FOOTNOTES

[1] *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Korn* v. *Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972).

[2] *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972); *Sero* v. *Oswald*, 351 F. Supp. 522 (S.D.N.Y. 1972); *Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970).

[3] *Serritella* v. *Engleman*, 339 F. Supp. 738, 748 (D.N.J.), *aff'd*, 462 F.2d 601 (3d Cir. 1972).

[4] *Gesicki* v. *Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972).

APPENDIX C

Order Appealed From.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY VAIL, JR. et al.,

Plaintiffs,

—against—

LAWRENCE M. QUINLAN, individually and in his capacity as Sheriff of Dutchess County, et al.,

Defendants.

Defendants, Juidice and Aldrich, having moved for a stay of this Court's order of January 7, 1976, declaring Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York facially unconstitutional and enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above statutes; and the court having heard Louis J. Lefkowitz, Esq., Attorney General of the State of New York (by A. Seth Greenwald, Esq., Assistant Attorney General), attorney for defendants Juidice and Aldrich, in support of said motion, and Monroe County Legal Assistance Corp., Mid-Hudson Valley Legal Services Project (by John D. Gorman, Esq., Acting Project Director), attorney for plaintiffs, in opposition thereto, and having considered the pleadings, briefs and oral arguments on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss; and upon the

Appendix C.

briefs submitted and arguments made on defendants' motion for a stay; and

It appearing that there is no genuine issue of any fact material to the resolution of plaintiffs' claim for a declaratory judgment and permanent injunctive relief, it is hereby

ORDERED AND ADJUDGED that partial summary judgment is granted in favor of plaintiffs, declaring that Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York are unconstitutional on their face and permanently enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above sections of the Judiciary Law; and it is further

ORDERED AND ADJUDGED that this court's prior order of January 7, 1976 is so modified; and it is further

ORDERED AND ADJUDGED that defendants' application for a stay is in all respects denied.

Dated: New York, N. Y.
January 23, 1976

J. Edward Lumbard (by H. M.)
HON. J. EDWARD LUMBARD, U.S.C.J.

Lloyd F. MacMahon
HON. LLOYD F. MACMAHON, U.S.D.J.

John M. Cannella
HON. JOHN M. CANNELLA, U.S.D.J.

Judgment Entered 1/28/76
Raymond F. Burghardt
Clerk

APPENDIX D

Notice of Appeal (Filed February 6, 1976).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4773
(LMM)

JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., Individually and in his capacity as a Judge of the Dutchess County Court, et al.,

Appellants,

—against—

HARRY VAIL, et al.,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1253, defendants Juidice and Aldrich and Louis J. Lefkowitz, Attorney General of the State of New York pursuant to New York Executive Law, § 71 hereby appeal to the Sureme Court of the United States from a declaration of unconstitutionality and injunction against the operation of New York Judiciary Laws §§ 756, 757, 770, 772, 773, 774 and 775, as well as the granting of class-action relief as encompassed therein, by judgment of the three-judge court signed and entered January 23, 1976 and this appeal is taken from each and every part of the judgment including class-action relief, as well as the whole thereof.

Appendix D.

Dated: New York, New York
February 6, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for defendants-appellants Juidice and Aldrich and pro se pursuant to Executive Law, § 71
By:
A. Seth Greenwald
A. SETH GREENWALD
Assistant Attorney General
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3396

To: CLERK
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

JOHN D. GORMAN, Esq.
Mid-Hudson Legal Services Project
50 Market Street
Poughkeepsie, N. Y. 12601

JOEL CAMCHE, Esq.
500 Fifth Avenue
New York, N. Y. 10036

GOLENBOCK & BARELL
60 East 42nd Street
New York, N. Y. 10017

APPENDIX E

Stay of Order (February 12, 1976).

SUPREME COURT OF THE UNITED STATES

No. A-683

JOSEPH JUIDICE, ETC., et al.,
Appellants

v.

HARRY VAIL, JR., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Southern District of New York, case No. 74 Civ. 4773, entered January 28, 1976, be and the same, is hereby stayed pending the timely docketing of an appeal in the above-entitled case.

Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Southern District of New York is affirmed, this order is to terminate automatically.

Appendix E.

In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 12th
day of February, 1976.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1397

JOSEPH JUDICE, Individually and in his capacity as Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., Individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, JR., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement
Filed April 2, 1976

Probable Jurisdiction Noted
June 21, 1976

TABLE OF CONTENTS

Relevant Docket Entries—74 Civ. 4773 United States District Court, Southern District of New York, Harry Vail, Jr., et al. v. Lawrence M. Quinlan, et al.

Date	*Proceedings*
10-30-74	Filed complaint and issued summons.
10-30-74	Filed order to show cause for an order determining this action may proceed as a class action . . . etc., Weinfeld, J. (Returnable November 16, 1974)
11- 4-74	Filed memorandum endorsed on Show Cause Order of 10-30-74. The within motion for preliminary injunction is referred to the Judge sitting in Part I on 11-6-74 . . . So Ordered MacMahon, J.
11- 6-74	Filed plaintiff's memorandum of law in support of application for Temporary Restraining Order and the convening of a three-judge court.
11- 6-74	Filed plaintiff's memorandum of law in support of motion for Temporary Restraining Order and preliminary injunction.
11- 6-74	Filed memorandum endorsed on Show Cause Order of 10-30-74. Application for temporary restraining order granted as to plaintiff Ward only. Irresponsable (sic) damage by the threat of immediate incarceration having been shown. See findings on Record. Submit an order in conformity with § 2284(3) . . . (Cannella, J.) m/n
11-11-74	Filed Temporary Restraining Order that defendants, their successors, agents . . . are temporarily restrained pursuant to 28 U.S.C. 2284(3), from arresting and imprisoning plaintiff Ward.

Relevant Docket Entries—74 Civ. 4773 United States District Court, Southern District of New York, Harry Vail, Jr., et al. v. Lawrence M. Quinlan, et al.

Date	*Proceedings*
11-11-74	Pursuant to New York State Judiciary Law Article 19, until a hearing and determination is made by the full three-judge district court or until this court revokes the Temporary Restraining Order . . . dated 4 P.M. November 8, 1974 . . . Cannella, J. m/n
11-22-74	Filed defendants (Juidice & Aldrich) memorandum of law in opposition to convening three-judge court.
1-14-75	Filed memorandum of law (plaintiff's) in support of motion for convening a three-judge court.
1-21-75	Filed plaintiff's order to show cause for preliminary injunction and temporary restraining order by a three-judge court . . . Returnable 1-27-75. Griesa, J.
1-21-75	Filed plaintiff's order to show cause for preliminary injunction, temporary restraining order and intervention by a three-judge court . . . Returnable 1-27-75. Griesa, J.
1-28-75	Filed affidavit of Charles P. Morrow in opposition to order to show cause.
1-28-75	Filed memorandum endorsed on show cause order filed 1-21-75. Motion granted, no opposition temporary restraining order pursuant to 28 U.S.C. § 2284(3) is hereby continued pending hearing on application for preliminary injunction and determination thereof upon the findings of Judge Griesa's order of 1-2-75. So ordered—Cannella, J. (m/n)

Relevant Docket Entries—74 Civ. 4773 United States District Court, Southern District of New York, Harry Vail, Jr., et al. v. Lawrence M. Quinlan, et al.

Date	*Proceedings*
1-28-75	Filed memorandum endorsed on order to show cause, etc. and intervention filed 1-21-75. Motion to intervene and add parties defendant granted, no opposition. Temporary restraining order pursuant to 28 U.S.C. § 2284(3) is hereby continued pending hearing and determination of application for preliminary injunction by three-judge court upon findings in Judge Griesa's order of 1-8-75. So ordered Cannella, J. (m/n).
2-13-75	Filed notice of motion to amend affidavits of Leslie Nameth and McKinley Humes . . . Returnable 2-24-75.
2-20-75	Filed order designating . . . three-judge court—Kaufman, Ch. C.J.
2-21-75	Filed plaintiff's notice of motion for an order to intervene Richard Russell, Jr., Helen Thorpe and Robert Harrell as named party plaintiffs and to add as party defendants Alexander Paulsen and Douglas Paulson, d/b/a Hudson View Part Co. and Dr. George T. C. Way, M.D. and Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works. Returnable 2-28-75.
2-26-75	Filed defendants etc. and George Montgomery, Jr., M.D. affidavit of Thomas A. Reed in opposition to motion to intervene and motion for a preliminary injunction.
3-10-75	Filed answer of defendant Public Loan Co., Inc. to the complaint.

Relevant Docket Entries—74 Civ. 4773 United States District Court, Southern District of New York, Harry Vail, Jr., et al. v. Lawrence M. Quinlan, et al.

Date	*Proceedings*
3-19-75	Filed plaintiff's memorandum of law.
3-20-75	Filed answer of defendant Herbert H. Redl, et. to complaint.
3-31-75	Filed memorandum on behalf of defendant Quinlan in support of motion to dismiss plaintiff's claims for damages for false imprisonment.
3-31-75	Filed answer of defendant Lawrence M. Quinlan to the complaint.
4- 3-75	Filed answer of defendant George Montgomery, Jr., M.D. to the complaint.
4-14-75	Filed defendants Juidice, Aldrich, Grady and Louis J. Lefkowitz, Pro Se memorandum of law in support of motion to dismiss.
4-22-75	Filed plaintiff's reply brief.
5- 7-75	Filed order that plaintiffs are authorized to proceed in forma pauperis. Cannella, J.
1- 7-76	Filed Opinion #43671 and Order . . . under the Due Process clause of the Fourteenth Amendment, we declare unconstitutional and enjoin further application, of Sections 756, 757, 770, 772, 773, 774 and 775 of Article 19 of the New York Judiciary Law. So order Lumbard, C.J., MacMahon, D.J. and Cannella, D.J. (m/n).
1- 7-76	Filed memorandum-decision #43674. Plaintiff's motion for class determination is granted. The class shall consist of all persons who have

Relevant Docket Entries—74 Civ. 4773 United States District Court, Southern District of New York, Harry Vail, Jr., et al. v. Lawrence M. Quinlan, et al.

Date	*Proceedings*
	been, or are presently subject to the civil contempt proceedings contained in the challenged sections of the Judiciary Law. So ordered MacMahon, J. m/n.
1-19-76	Filed defendant's affidavit and show cause order to stay order of the court for 60 days or until further order of the Supreme Court of the United States. Returnable 1-15-76.
1-23-76	Filed order of (three-judge court) that partial summary judgment is granted in favor of plaintiffs, declaring that Sections 756, 757, 770, 773, 774, 775 of the Judiciary Law of New York State are unconstitutional on their face and permanently enjoining the operation of said statutes against plaintiffs and members of their class, as indicate ORDERED AND ADJUDGED that this Court's prior order of 1-7-76 is so modified, and that defendant's application for a stay is in all respects denied. Lumbard, J., MacMahon, J. & Cannella, J. Judgment entered 1-28-76.
1-28-76	Filed defendant's supplemental affidavit in support of the pending resettling of the order to show cause of 1-14-76, and the argument before the three-judge court on 1-17-76.
2- 6-76	Filed defendants appellants Juidice and Aldrich and pro se pursuant to Executive Law § 71, notice of appeal to the Supreme Court from a declaration of unconstitutionality and injunction against the operation of certain New York Judiciary Laws.

Relevant Docket Entries—74 Civ. 4773 United States District Court, Southern District of New York, Harry Vail, Jr., et al. v. Lawrence M. Quinlan, et al.

Date	*Proceedings*
3- 4-76	Filed order from Supreme Court of the United States that the judgment of the United States District Court entered 1-28-76 is stayed pending the timely docketing of an appeal, etc. . . . Thurgood Marshall, Associate Justice of the Supreme Court of the United States.
4- 9-76	Filed Certificate from the Supreme Court of the United States that an appeal was filed on 4-2-76, and that the case has been docketed #75-1397, and is now pending . . . Clerk.
6- 2-76	Filed order transferring this action with all filed papers with a certified copy of his order, to the Supreme Court of the United States MacMahon, J. n/m.
6- 3-76	Filed notice that original record has been certified and transmitted to the United States Supreme Court by certified mail.
6-29-76	Filed true copy of order from Supreme Court of the United States. The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted 6-21-76 Clerk, United States Supreme Court m/n.

Complaint—Class Action.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4773 (Judge MacMahon)

HARRY VAIL, JR., PATRICK WARD, and RICHARD MCNAIR, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

against

LAWRENCE M. QUINLAN, individually and in his capacity as Sheriff of Dutchess County, JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as Judge of the Dutchess County Court, and PUBLIC LOAN COMPANY, INC., ARNOLD GORAN, M.D., P.C., and GEORGE MONTGOMERY, JR., M.D.,

Defendants.

I.

PRELIMINARY STATEMENT

1. Plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this Court declare invalid and enjoin the enforcement of New York State Statutes, Judiciary Law Article 19, Sections 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 (hereinafter Sections 756 etc.).

These sections of the Judiciary Law provide for the imposition of a fine and imprisonment of "contumacious" judgment debtors and the seizure of property without due

process or the right to counsel in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States. Furthermore, they deny the judgment debtor equal protection of the laws and subject the judgment debtor to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States.

The statute creates a series of *ex parte* steps that can cause an individual to be indefinitely imprisoned and fined without ever appearing before a judge. A person can be imprisoned solely upon two affidavits of the attorney for one interested party and a process server. Moreover, the statute's full force is almost always applied only to the very poor.

2. Plaintiffs Vail and McNair also seek damages for the wrongful imposition of imprisonment and fine pursuant to the above sections of the New York State Judiciary Law in violation of their Constitutional rights.

3. Plaintiff Ward also seeks a temporary restraining order and preliminary injunction against enforcement of New York State Judiciary Law, Sections 756, etc., to prevent his imminent imprisonment the first week of November, 1974.

II.

Jurisdiction

4. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1343 (3), (4) which provides for original jurisdiction of this Court in all suits authorized by 42 U.S.C. Section 1983 to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress

providing for equal rights or civil rights of all persons within the jurisdiction of the United States and 28 U.S.C. 1331 as the matter in controversy exceeds $10,000 and arises under the Constitution of the United States.

5. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. Section 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure.

III.

Three-Judge Court

6. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Section 2281, 2284, since plaintiffs seek an injunction to restrain defendants, who are state officers, from the enforcement, operation, and execution of state statutes (New York State Judiciary Law, Sections 756, etc.) of state-wide applicability on the ground that said statutes are contrary to the Constitution of the United States.

IV.

Plaintiffs

7. Plaintiff Harry Vail, Jr. is a citizen of the United States and the State of New York and presently resides at 541 Main Street, Poughkeepsie, New York, with his wife and two infant children. Plaintiff Vail and his family are indigent and receive public assistance from the Dutchess County Department of Social Services.

8. Plaintiff Patrick Ward is a citizen of the United States and the State of New York and presently resides at 94 Washington Street, Poughkeepsie, New York. Plaintiff Ward is unemployed and supports himself on unem-

ployment insurance benefits in the sum of $61.00 a week, of which $30.00 is paid to his divorced wife for the support of his wife and their child.

9. Plaintiff Richard McNair is a citizen of the United States and the State of New York and presently resides at 241 Smith Street, Apt. 9-A-5, Poughkeepsie, New York, with his wife and three children. Plaintiff McNair is unemployed. Plaintiff McNair's wife, Virginia McNair, is employed and earns $90 per week.

V.

Class Action Allegations

10. Plaintiffs Vail, Ward, and McNair bring this action on their own behalf and pursuant to Rule 23(a), (b) (2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The class represented by Plaintiffs Vail, Ward, and McNair consist of all persons who are subject to and/or have been subjected to civil contempt proceedings pursuant to Article 19 of the New York State Judiciary Law which sets forth civil contempt procedures denying the plaintiffs and the class they represent rights protected by the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

11. The class of plaintiffs set forth in paragraph 10 is so numerous that joinder of all the members is impractical. In the past twelve months there have been approximately 500 persons who have been subject to or have been subjetced to civil contempt proceedings set forth in New York State Judiciary Law, Section 756, etc., in Dutchess County. There are questions of law and fact common to the class, namely, the imposition of a fine and/or imprisonment in

civil contempt proceedings pursuant to New York State Judiciary Law, Section 756, etc., in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The claims of the representative parties are typical of the claims of the class. The Mid-Hudson Valley Legal Services Project (Monroe County Legal Assistance Corporation), attorneys for the plaintiffs will fairly and adequately protect the interests of the class. In subjecting plaintiffs to civil contempt proceedings in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, the Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VI.

Defendants

12. Defendant Lawrence M. Quinlan is the Sheriff of Dutchess County, State of New York. As such, he has the duty pursuant to New York State Statutes, Judiciary Law, Article 19, Sections 765, 767, 769, 770, 771, 772, 773, 774, and 775 to execute commitment orders and to incarcerate contumacious debtors in the Dutchess County Jail. He is a resident of the State of New York, and a citizen of the United States.

13. Defendants Joseph Juidice and Raymond E. Aldrich, Jr. are Judges of the Dutchess County Court, located at 10 Market Street, Poughkeepsie, New York. As such, they have the authority pursuant to New York State Statutes, Judiciary Law, Article A, Sections 754, 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 to issue orders of contempt, warrants of attachment and commitment. Defend-

ants Juidice and Aldrich are residents of the State of New York and citizens of the United States.

14. Upon information and belief, defendant Public Loan Company, Inc. (hereinafter, Public Loan), is a small loan company incorporated pursuant to the New York State Banking Law with offices located at 2 Catherine Street, Poughkeepsie, New York.

15. Upon information and belief, defendant Arnold Goran, M.D., P.C. (hereinafter Goran) is a professional corporation incorporated pursuant to the laws of the State of New York, with offices located at 74 West Cedar Street, Poughkeepsie, New York.

16. Defendant George Montgomery, Jr., M.D. is a citizen of the United States and the State of New York with offices located at 34 Livingston Road, Poughkeepsie, New York.

VIII.

Factual Allegations

A. Plaintiff Vail

17. Over five years ago, defendant Vail and his wife, Charlene entered into an "open ended" credit agreement with Public Loan pursuant to which, from time to time, the Vails would purchase items of personal property, the last purchase occurring approximately four years ago. This credit arrangement provided that the Vails would reduce the loan balance by making payments of approximately $20.00 a month.

18. Plaintiff Vail had made periodic payments pursuant to the agreement until January, 1974, at which time he was

no longer employed and forced to seek public assistance from the Dutchess County Department of Social Services to support his family. Plaintiff Vail and his family have received monthly public assistance allotments of approximately $378.00 from January, 1974 to present time, which is not subject to attachment or levy pursuant to the laws of the State of New York. Plaintiff Vail also remains unemployed at the present time.

19. On January 7, 1974, the Public Loan Company served a summons on the plaintiff Vail for money owed pursuant to the credit agreement.

20. On January 23, 1974, a default judgment was entered in City Court of the City of Poughkeepsie, New York, in favor of Public Loan Company, Inc. against Plaintiff Harry Vail, Jr. and Charlene Vail for $534.63.

21. On April 22, 1974, Charles P. Morrow, attorney for Public Loan allegedly caused to be served a subpoena duces tecum, requiring the plaintiff, Harry Vail, Jr. to appear on May 28, 1974 before Charles P. Morrow at 40 Cannon Street, Poughkeepsie, New York for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of January 23, 1974 and to produce certain records.

22. On July 22, 1974, after Plaintiff Vail's noncompliance with the subpoena, defendant Juidice issued an Order to Show Cause, ordering Plaintiff Vail to appear at the Dutchess County Court on August 13, 1974 at 9:30 A.M. to "show cause why he should not be punished as for contempt for violation of and noncompliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

23. Defendant Juidice issued this Order to Show Cause pursuant to Judiciary Law, Article 19, Section 757 (1) which provides that the Court may commence civil contempt proceedings by making

> (1) . . . an order, requiring the accused to show cause before it or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or
>
> (2) Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

A copy of this Order to Show Cause was served on the Plaintiff Vail on July 24, 1974.

24. When Plaintiff Vail failed to appear in County Court on August 13, 1974, defendant Juidice, on August 30, 1974, issued an Order Imposing Fine which held Plaintiff Vail in contempt and further ordered that "for such contempt the sum of $250.00 together with $20.00 costs of these proceedings making a total of $270.00 to be paid *to the judgment creditor* . . . in installments of $10 commencing on week received this order" . . . (emphasis supplied).

25. Defendant Juidice issued the order imposing fine pursuant to Judiciary Law Section 770 which provides that:

> "If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede or prejudice

> the rights or remedies of a party to an action or special proceeding brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment or both as the nature of the case requires. A warrant of commitment must issue accordingly;" . . .

26. Defendant Juidice issued the Order Imposing Fine based upon the affirmation of Charles P. Morrow, attorney for defendant Public Loan and the affidavit of Virginia Traver, the individual who served Plaintiff Vail with a copy of the Order to Show Cause. Upon information and belief, the affirmation of Charles P. Morrow stated that Plaintiff Vail failed to comply with a Subpoena Duces Tecum requiring the production of records for examination which did defeat, impair, impede, and prejudice the rights of the defendant Public Loan. In the Order Imposing Fine, the defendant Juidice fined plaintiff Vail $250 plus $20 costs pursuant to Judiciary Law Section 773. Section 773 provides as follows:

> "If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of

the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section."

27. A copy of this Order Imposing Fine was served on plaintiff Vail on September 4, 1974.

28. In the latter part of August, 1974, plaintiff Vail informed Public Loan that he was unable to make payment on his indebtedness to Public Loan due to his indigency and an employee of Public Loan informed Vail that if he made a payment of $5.00 "he would not have to appear in Court". Pursuant to this conversation, plaintiff Vail delivered $5.00 to Public Loan.

29. When Plaintiff Vail failed to comply with the Order Imposing Fine, Defendant Juidice issued an *ex parte* Commitment Order on September 23, 1974, which ordered as follows:

"That without further notice to said Harry Vail, Jr., the Sheriff of any County within the State of New York—wherein he may be apprehended shall forthwith arrest him without further process, and commit him to the County Jail of said County and hold him in close custody until he shall have paid said fine of $270 together with said Sheriff's fees and the disbursements on the execution of this order, or is discharged according to law."

30. Defendant Juidice issued the Commitment Order based upon:

"The subpoena dated April 19th, 1974, which directed Harry Vail, Jr. to appear and answer for examination and supplementary proceedings. The affidavit of

Virginia Traver, verified April 23rd, 1974, showing due service thereof, the order to show cause why Harry Vail, Jr. should not be punished for contempt of court, dated July 22, 1974, the affirmation of Charles P. Morrow, Esq., dated July 19th, 1974, in support of said order; the affidavit of Virginia Traver, dated July 24, 1974, showing due service of a certified copy of said order to show cause, and on reading and filing the order entered herein on August 30th, 1974, fining the said the sum of $270 and directing the payment of said fine in installments of $10 each commencing on September 9th, 1974 and on reading and filing the affidavit of George Traver verified September 4th, 1974 showing the service of a certified copy of said order with notice of entry thereof on said Harry Vail, Jr., and AFFIDAVIT OF NON-COMPLIANCE dated September 16th, 1974 showing that said order has not been complied with.

31. Defendant Juidice issued the commitment order pursuant to Judiciary Law Article 19, Section 756 which provides as follows:

"Where the offense consists of a neglect or a refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding are paid, or until he is discharged according to law."

32. On October 1, 1974, deputies of defendant Quinlan went to plaintiff Vail's home and arrested him pursuant

to the Commitment Order and then committed him to the Dutchess County Jail.

33. The deputies of defendant Quinlan arrested and held plaintiff Vail in the Dutchess County Jail pursuant to Judiciary Law Sections 756 and 774. Section 774 provides as follows:

> "1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more."

34. Plaintiff Vail had one dollar remaining at the time of his arrest and no access to additional resources until he received his public assistance check for the month of October, 1974. He and his family own no property of value other than household furniture and clothing.

35. On October 2, 1974, the plaintiff was released from Dutchess County Jail pursuant to Judiciary Law Section 774, after a relative lent him funds to pay the fine totalling $294.25. This debt has remained unpaid due to his indigency.

36. Plaintiff Vail was charged $250.00 for the fine, $20.00 for costs, $7.50 for service fees, $1.00 for mileage fees, $13.50 for poundage, $.25 for an affidavit and $2.00 for C. & D.

37. The sum of $294.25 was delivered to a deputy of defendant Quinlan who, upon information and belief, delivered the money to defendant Public Loan pursuant to Section 773 of the Judiciary Law.

38. By virtue of the foregoing, plaintiff Vail was wrongfully imprisoned for approximately 24 hours, suffered mental anguish, shame and humiliation, damage to his character and reputation, damage to his credit standing, and was wrongfully deprived of $294.25 in violation of his Fifth, Eighth, and Fourteenth Amendment rights to the United States Constitution.

39. Plaintiff Vail was deprived of his liberty and his property in the amount of the $294.25 fine without being brought before the Court prior to incarceration to answer to defendant Public Loan's charges or to plead his indigency in violation of his due process rights under the Fifth, and Fourteenth Amendments to the United States Constitution.

40. At no time during the course of the civil contempt proceedings was the plaintiff Vail apprised of his right to counsel in these proceedings nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

41. Pursuant to the commitment order, plaintiff Vail was deprived of liberty because of his indigency. This deprivation of liberty constitutes a violation of his rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution by subjecting plaintiff Vail to arrest and imprisonment because of his inability to pay the fine while a person with the ability

to pay the fine would not be subject to arrest or imprisonment.

42. Pursuant to the commitment order, plaintiff Vail was subjected to an indefinite term of imprisonment for the non-payment of a fine that he was financially unable to pay. Because the indefinite term of imprisonment is disproportionate to the alleged offense, it is in violation of the ban of the Eighth Amendment to the United States Constitution on the imposition of cruel and unusual punishments.

B. PLAINTIFF WARD

43. About September, 1973, plaintiff Ward's wife, Patricia, received medical services from defendant Goran and was charged $125.00 for said services. At that time, plaintiff Ward and his wife were married.

44. On November 29, 1973, plaintiff Ward was served with a Summons with Notice commencing *Arnold Goran, M.D., P.C.* v. *Patrick Ward,* Index No. 1973/881D, in the Dutchess County Court, for services rendered in the amount of $125.00, with interest and costs.

45. On December 26, 1973, a default judgment against plaintiff Ward was entered in the above-cited action for $146.84.

46. On December 27, 1973, plaintiff Ward was served with a subpoena, issued by Jeffrey S. Graham, Esq. attorney for defendant Goran, requiring him to appear in person at the Dutchess County Courthouse to produce books and records and to be examined in connection with efforts to enforce the default judgment dated December 26, 1973. Plaintiff Ward appeared at the appointed time and place,

however defendant Goran's attorney Jeffrey Graham did not appear. Mr. Graham was contacted by phone by an employee of the Court who, upon information and belief, informed Mr. Graham that plaintiff Ward had appeared as directed by the Subpoena. At that time, Mr. Graham spoke with plaintiff Ward on the phone and instructed him to come to Graham's office.

47. Plaintiff Ward went to Graham's office and was subjected to inquiries by Mr. Graham as to his salary, family size, and employment status. Believing the subpoena required production of books and records and examination to be made before the Dutchess County Court, plaintiff Ward refused to be examined in Mr. Graham's office but offered to present all material information before the Court. Then Mr. Graham directed plaintiff Ward to leave his office. Plaintiff Ward was not informed of any adjourned date on the subpoena.

48. On May 15, 1974, plaintiff Ward was served with a Notice of Motion for Order Finding Defendant in Contempt of Court ordering the plaintiff to appear in Dutchess County Court on May 28, 1974. This matter was adjourned once to July 16, 1974, and once to July 23, 1974.

49. In June, 1974, plaintiff Ward received a letter from Mr. Graham threatening court action if there was continued non-payment of the judgment. In response to Graham's letter, plaintiff Ward contacted Mr. Graham and arranged to satisfy the judgment by paying $10.00 a week to Graham until full payment was made.

50. On July 4, 1974, plaintiff Ward was "layed off" from his job and shortly thereafter he notified Mr. Graham of this development and told him that he would be unable to make the $10.00 payment according to their arrangement.

51. On or about October 3, 1974, plaintiff Ward was served with an Order of Contempt, issued by defendant Aldrich on September 19, 1974, pursuant to Judiciary Law, Article 19, Section 770, finding plaintiff Ward in Contempt of Court because he "failed to produce certain records for an examination at a place named on the 11th day of January, 1974, and adjourned to the 25th day of February, 1974, as required by Subpoena Duces Tecum ..."

52. Defendant Aldrich's Order of Contempt subjects plaintiff Ward to a fine or imprisonment as follows:

> ORDERED, that the said defendant Patrick Ward, as punishment for said Contempt of Court, be and hereby is fined the amount of $250.00 and $20.00 costs, the said amount when paid, with the exception of the costs, to be applied in reduction of the Judgment; and it is further
>
> ORDERED, that the defendants may purge themselves of the aforesaid Contempt by paying to the plaintiff's attorney the sum of $250.00 plus $20.00 costs within thirty (30) days after the service upon the defendant of a certified copy of this Order with Notice of Entry thereof; and it is further,
>
> ORDERED, that in the event that the defendant fails to purge himself of this Contempt, as provided herein, within the time specified the plaintiff may apply ex parte to this Court upon proof by affidavit of the defendant's failure to purge himself, as provided herein for an Order directing the sheriff of any County wherein the defendant may be found, to detain the defendant in close custody in the common or County jail of said County, until he shall have paid the entire fine imposed herein, or any part of such fine that remains unpaid at the time of said commitment, or until he shall have paid the entire fine imposed herein, or any part of such fine that remains unpaid at the time of said commitment, or until he shall have otherwise been discharged according to law.

53. Defendant Aldrich issued the Order of Contempt pursuant to Section 770 of Article 19 which provides that if the accused has committed the offense as charged ". . . he be punished by fine or imprisonment or both . . ." and Section 773 provides for a fine not exceeding $250.00 plus costs when the actual loss or injury to the aggrieved party is not shown and further provides that the fine shall be paid over to the aggrieved party.

54. At the present time, plaintiff Ward is unemployed and maintains himself on Unemployment Insurance Benefits of $61 a week. He makes weekly support payments of $30.00 to his wife and child. His rent is $25.00 a week. He has no other funds available or possessions that could be used to pay the fine imposed.

55. As the Order of Contempt was served upon plaintiff Ward about October 3, 1974, plaintiff is in imminent danger of being imprisoned pursuant to the Order of Contempt because he is financially unable to pay the fine imposed.

56. Plaintiff Ward contends that the imposition of the fine and the punishment of imprisonment in the event the fine is unpaid is violative of his rights secured by the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

57. With respect to the fine of $250.00 plus $20.00 costs, plaintiff Ward contends that defendant Aldrich

wrongfully imposed the fine without affording him the procedural right to answer defendant Goran's charge of contempt or to challenge the amount of the fine imposed in violation of his right to due process secured by the Fifth and Fourteenth Amendments.

58. The fine imposed of $250.00 plus costs pursuant to defendant Aldrich's Order of Contempt exceeds the default judgment of $146.84 in the sum of $103.16. Pursuant to Section 773 the entire $250.00 plus costs is to be paid over to the defendant Goran. Plaintiff Ward contends that this procedure constitutes a wrongful taking of his $103.16 in violation of the Fourth and Fourteenth Amendments.

59. Plaintiff Ward has not been apprised of his right to counsel in this proceeding nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the right to counsel secured by the Fifth and Fourteenth Amendments.

60. The punishment of imprisonment in the event the fine is unpaid is violative of the Equal Protection clause of the Fourteenth Amendment in that it works an invidious discrimination against those who are too poor to pay the fine. Plaintiff Ward is one who is indigent and unable to pay the fine and, as a result, he is faced with the imminent danger of imprisonment.

61. Plaintiff Ward contends that the imprisonment that may occur due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

C. PLAINTIFF MCNAIR

62. About May, 1967, plaintiff McNair's wife, Virginia McNair received medical services from defendant Montgomery, Jr., M.D. and was charged $318.42 for said services.

63. Plaintiff McNair was served with a summons commencing *George Montgomery, Jr., M.D.* v. *Richard McNair and Virginia A. McNair*, Index No. 1973/906 in the City Court, City of Poughkeepsie, New York, for services rendered in the amount of $318.42 with interest and costs.

64. On May 15, 1973, a default judgment against plaintiff McNair and Virginia A. McNair was entered in the above-cited action for $362.42.

65. On May 29, 1973, Thomas A. Reed, Attorney for defendant Montgomery served by mail a subpoena duces tecum, requiring plaintiff McNair to appear on June 18, 1973, before a notary public at 75 Market Street, Poughkeepsie, New York for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of May 15, 1973, and to produce certain records.

66. When plaintiff McNair failed to appear on May 29, 1973, on June 21, 1973, defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757(1) ordering plaintiff McNair to appear at the Dutchess County Court on July 10, 1973, at 10:00 a.m. to "show cause why he should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

67. When Plaintiff McNair failed to appear on July 10, 1973, Plaintiff McNair was notified by mail that the

hearing on the Order to Show Cause was adjourned to July 24, 1973, at 10:00 a.m.

68. When plaintiff McNair failed to appear in County Court on July 24, 1973, defendant Juidice issued an Order of Contempt on August 2, 1973, pursuant to Judiciary Law Article 19, Section 770 holding plaintiff McNair in contempt and ordering:

> ORDERED that the said defendant Richard McNair for his misconduct and willful contempt be and he is hereby fined the sum of $250.00 to be paid to the plaintiff, besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the plaintiff, by making installment payments in the amount of Twenty ($20.00) dollars per week, commencing one week after service of a certified copy of this order. Upon payment as aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

69. Defendant Juidice issued the Order of Contempt based upon the following:

> Upon reading and filing the Order to Show Cause dated the 21st day of June, 1973, with due proof of service thereof on the defendant, the affirmation of Thomas A. Reed dated the 20th day of June, 1973, and upon all the pleadings and proceedings heretofore had herein, and after hearing Reed & Reed, Esqs., Thomas A. Reed, of counsel, for the plaintiff in support of said motion, and there being no opposition there to.

70. A copy of this Order of Contempt was served on plaintiff McNair on January 17, 1974.

71. When plaintiff McNair failed to comply with the Order of Contempt, defendant Juidice issued an *ex parte* Commitment Order pursuant to Judiciary Law Article 19, Section 756 on January 31, 1974, which ordered as follows:

> NOW THEREFORE, you are hereby commanded that you take the body of Richard McNair, and him closely and safely keep in your custody in the common jail of your county until he shall have paid the sum of $250.00, the fine imposed as aforesaid, also the costs and expenses amounting to $10.00, and your fees hereon, or until the said Richard McNair shall be sooner discharged by an order of the Court.

72. Defendant Juidice issued the Commitment Order based upon:

> WHEREAS proof has been made to the undersigned that more than 7 days have elapsed since the service of said order with notice of entry thereof on said defendant and that said defendant has not paid the fine specified in said order; to wit: the sum of $250.00 plus $10.00 costs, or any part thereof.

73. On February 21, 1974, deputies of defendant Quinlan arrested Plaintiff McNair pursuant to the Commitment Order and committed him to the Dutchess County Jail pursuant to Judiciary Law Sections 756 and 774.

74. Plaintiff McNair remained in Dutchess County Jail for five hours on February 21, 1974, until he paid the $283.75 fine ($250.00 fine, plus $10.00 costs, plus fees) from rent money and money his wife borrowed from her credit union at work.

75. The sum of $283.75 was delivered to a deputy of defendant Quinlan who, upon information and belief, delivered the money to defendant Montgomery pursuant to Section 773 of the Judiciary Law.

76. By virtue of the foregoing, plaintiff McNair was wrongfully imprisoned for approximately 5 hours, suffered mental anguish, shame and humiliation, damage to his character and reputation, damage to his credit standing, and was wrongfully deprived of $283.75 in violation of his Fifth, Eighth, and Fourteenth Amendment rights to the United States Constitution.

77. Plaintiff McNair was deprived of his liberty and his property in the amount of $283.75 fine without being brought before the court to answer defendant Montgomery's charges or to plead his indigency in violation of his due process rights under the Fifth, and Fourteenth Amendments to the United States Constitution.

78. At no time during the course of the civil contempt proceedings was the plaintiff McNair apprised of his right to counsel in these proceedings nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

79. Pursuant to the commitment order, plaintiff McNair was deprived of liberty because of his indigency. This deprivation of liberty constitutes a violation of his rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution by subjecting plaintiff McNair to arrest and imprisonment because of his inability to pay the fine while a person with the ability to pay the fine would not be subject to arrest or imprisonment.

80. Pursuant to the commitment order, plaintiff McNair was subjected to an indefinite term of imprisonment for the nonpayment of a fine that he was financially unable to pay. Because the indefinite term of imprisonment is disproportionate to the alleged offense, it is in violation of the ban of the Eighth Amendment to the United States Constitution on the imposition of cruel and unusual punishments.

81. On April 16, 1974, Thomas A. Reed, attorney for defendant Montgomery issued a subpoena duces tecum requiring plaintiff McNair to appear on May 7, 1974, before a notary public at 75 Market Street, Poughkeepsie, New York, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of May 15, 1974, and to produce certain records.

82. On July 12, 1974, Thomas A. Reed, attorney for defendant Montgomery issued an income execution which provides as follows:

> "a transcript of the judgment was filed on May 22, 1973 with the Clerk of the County of Dutchess and the Judgment Debtor is receiving or will receive from Hudson River State Hospital whose address is North Road, Poughkeepsie, New York more than $85.00 per

week, to wit $100.00 or more to be paid in weekly amounts of $100.00 or more each:"

VIII.

FIRST CAUSE OF ACTION

83. Plaintiffs restate, reallege, and incorporate each and every allegation in paragraphs 1-82.

84. The Fifth and Fourteenth Amendments to the United States Constitution provide that no state shall "deprive any person of life, liberty, or property without due process of law".

85. New York Judiciary Law, Article 19, which authorizes the defendants who are acting under color of state law to commit and hold the plaintiffs in Dutchess County Jail is unconstitutional in that it has and shall deprive the plaintiffs and the class they represent of their liberty and property without due process of law guaranteed to them by the Fifth and Fourteenth Amendments to the United States Constitution by subjecting the plaintiffs to punishment by fine and/or imprisonment without affording the plaintiffs the right to counsel and an opportunity to be brought before the Court to challenge the fine and/or imprisonment, offer an explanation for the failure to appear on any prior occasion, and inform the court of any defense to the order of contempt or underlying action.

IX.

SECOND CAUSE OF ACTION

86. Plaintiffs restate, reallege, and incorporate each and every allegation in paragraphs 1-85.

87. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws".

88. New York Judiciary Law Article 19 gives the courts the power in civil contempt proceedings to commit indigent individuals to jail for indefinite periods of time until individuals pay the fine imposed and, as a result, the statute works an invidious discrimination against poor persons without justification in violation of the Fourteenth Amendment to the United States Constitution.

X.

THIRD CAUSE OF ACTION

89. Plaintiffs restate, reallege, and incorporate each and every allegation in paragraphs 1-88.

90. The Eighth Amendment of the United States Constitution provides that no person shall be subjected to "cruel and unusual punishments".

91. Judiciary Law, Article 19, authorizes the Defendants to commit and hold individuals in jail in civil contempt proceedings for periods of time disproportionate to their offense in violation of the Eighth and Fourteenth Amendment to the United States Constitution.

XI.

FOURTH CAUSE OF ACTION

92. Plaintiffs restate, reallege, and incorporate each and every allegation in paragraphs 1-91.

93. The Fourth Amendment of the United States Constitution provides for the freedom from seizure of property except upon probable cause.

94. New York Judiciary Law Article 19 authorizes the imposition of a fine which is to be paid over to the aggrieved party under the direction of the court. As the fine may exceed the amount of damage suffered by the aggrieved party, the fine constitutes a wrongful seizure of property without probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

XII.

Prayer for Relief

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284 to determine this controversy, and set this case down promptly for a hearing.

2. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. § 2284 (3) restraining defendants, their successors in office, agents and employees, and all other persons in action concert and participation with them, from continuing to cause irreparable harm to Plaintiff Ward by

enforcing civil contempt proceedings under Article 19 of the New York State Judiciary Law and threatening to imprison Plaintiff Ward.

4. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that New York State Statutes 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 are invalid on the grounds that it is violative of provisions contained in the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

5. Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from enforcing civil contempt proceedings under Article 19 of the New York State Judiciary Law.

6. Enter Judgment on behalf of the Plaintiff Vail in the amount of $100,000 for his unlawful imprisonment.

7. Enter Judgment on behalf of the plaintiff McNair in the amount of the $100,000 for his unlawful imprisonment.

8. Enter Judgment on behalf of plaintiff Vail in the amount of $294.25 against defendant Public Loan the recipient of the fine unlawfully imposed in violation of the Fifth, Eighth and Fourteenth Amendments.

9. Enter Judgment on behalf of plaintiff McNair in the amount of $283.75 against defendant Montgomery the recipient of the fine unlawfully imposed in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments.

Complaint—Class Action.

10. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiff his costs herein, and also grant him and all persons similarly situated such additional or alternative relief, as may seem to this court to be just, proper, and equitable.

Respectfully submitted,

MID-HUSON VALLEY LEGAL SERVICES PROJECT
(Monroe County Legal Assistance Corp.)
Attorneys for Plaintiffs
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Telephone: 914—452-7911
John D. Gorman, of Counsel
Jane E. Bloom, of Counsel

MONROE COUNTY LEGAL ASSISTANCE CORP.
GREATER UP-STATE LAW PROJECT
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RENE H. REIXACH, JR.
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Rochester, New York 14614
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(Affidavits of verification sworn to October 29, 1974, Patrick Ward, Harry Vail, Jr. Jurat.)

Order to Show Cause.

[SAME TITLE]

Upon the complaint of the plaintiffs, sworn to October 29th, 1974, the affidavit of plaintiff Patrick Ward, sworn to on October 29th, 1974, and the affidavits of John D. Gorman, Esq., sworn to on October 29th, 1974, it is hereby ordered, that the defendants show cause before this Court at the United States Courthouse, Foley Square, Room 706, New York, New York, on November 6, 1974, at 10 a.m., why an order should not be entered granting the plaintiffs herein the following relief:

1. An order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action pursuant to Rule 23(a), (b)2 because the class, consisting of all persons subject to or those who have been subjected to civil contempt procedures as set forth in New York Judiciary Law, Article 19, Sections 756, 757, 765, 767, 769, 770, 771, 772, 773, 774 and 775 is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representatives are typical of the claims of the class; the representatives will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief with respect to the class as a whole.

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction and this cause, in accordance with the provisions of Title 28, United

States Code, Sections 2281 and 2284 which require the convening of such a court when an interlocutory and permanent injunction is sought to restrain the enforcement of a statewide statute that is alleged to conflict with the Constitution of the United States. The preliminary and permanent injunctions are sought to restrain the defendants, their successors, agents and employees, and all others acting in concert with them, from enforcement, operation and execution of New York State Judiciary Law, Article 19, Sections 756, etc., which set forth the procedures in civil contempt proceedings.

3. A temporary restraining order pursuant to Title 28, United States Code, Section 2284(3), and preliminary injunction restraining the defendants, their successors, agents, employees, and all those acting in concert with them from imposing any fines and/or imprisonment on plaintiff Ward or the class he represents pursuant to New York Judiciary Law, Article 19, Section 756, etc.

Plaintiff Ward seeks this relief for himself and all others similarly situated on the grounds that:

(a) He and all others similarly situated are threatened with imminent and irreparable injury in that he is subject to arrest and imprisonment on or about November 4, 1974, pursuant to an Order of Contempt, issued by defendant Aldrich in compliance with New York Judiciary Law, Article 19, Sections 756, etc.;

(b) The issuance of a temporary restraining order will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to plaintiff Ward and others similarly situated;

(c) New York Judiciary Law, Article 19, Section 756 etc. violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution;

(d) Plaintiff Ward has no adequate remedy at law, as set forth more fully in the verified complaint and the affidavit of plaintiff Ward.

ORDERED, that this ORDER TO SHOW CAUSE, together with papers upon which it is granted be served personally upon the defendants or their attorneys on or before the 31st day of October, 1974 by noon.

Dated: October 30, 1974.

Issued at 11:50 p.m.

s/ EDWARD WEINFELD
United States District Judge

Affidavit of John D. Gorman (Annexed).

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF DUTCHESS } ss.:

JOHN D. GORMAN, being duly sworn, deposes and says:

1. I am Managing Attorney of the Poughkeepsie Office of the MID-HUDSON VALLEY LEGAL SERVICES PROJECT, Monroe County Legal Assistance Corp., attorneys for the plaintiffs, with offices at 50 Market Street, Poughkeepsie, New York.

2. I submit this affidavit in support of plaintiffs' motion for a temporary restraining order, preliminary injunction, a determination that this action may proceed as a class action and a determination to convene a statutory court of three judges pursuant to Title 28, United States Code, Sections 2281 and 2284.

3. The plaintiffs, who are persons currently subject to or have been subject to contempt proceedings pursuant to New York Judiciary Law, Article 19, Section 756 etc., individually and on behalf of the class they represent, seek declaratory and injunctive relief against the imposition of fines and/or imprisonment pursuant to said statute on the grounds that the statute violates plaintiffs' rights as secured by the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

4. In addition, plaintiffs Vail and McNair seek damages for wrongful imprisonment and return of fines paid by them.

Affidavit of John D. Gorman (Annexed).

5. A temporary restraining order is sought on behalf of plaintiff Ward because he is in danger of incarceration on or about November 4, 1974, pursuant to an Order of Contempt issued by defendant Aldrich on September 19, 1974. Defendant Aldrich's Order holds Ward in contempt of court and imposes a fine of $250.00 plus $20.00 costs and further provides that Ward may purge himself of the contempt by paying the fine to Goran's attorney within 30 days after service of the Order of Contempt. In the event the fine is unpaid after the 30 day period, Aldich's Order continues, defendant Goran can secure an *ex parte* Warrant of Commitment from the Court which shall require defendant Quinlan to arrest and detain plaintiff Ward until the entire fine is paid.

6. The Order of Contempt was served upon plaintiff Ward on or about October 3, 1974, thereby subjecting him to the imminent danger of arrest and imprisonment on November 4, 1975, if the fine is unpaid.

7. Plaintiff Ward is unable to pay the fine. He is currently unemployed and maintains himself on Unemployment Insurance Benefits of $61.00 a week, of which $30.00 is paid to his wife pursuant to a New York State Family Court order of support.

8. Upon information and belief, plaintiff Ward has attempted to borrow to pay the fine from family and friends, and finance companies, without success.

9. By virtue of the foregoing, defendant Ward is in imminent danger of suffering immediate and irreparable injury, and accordingly prays for an order restraining defendant Quinlan from arresting and incarcerating him pending hearing and determination of this motion.

10. There has been no previous application for the relief requested herein.

11. There is no adequate remedy at law.

RULE 23 (a)

12. With respect to plaintiffs' request to maintain this action as a class action, there are four prerequisites for class relief pursuant to Rule 23(a), which are:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

All of these prerequisites are met in this action.

RULE 23 (a) (1)—IMPRACTICABILITY OF JOINDER

13. In the past twelve months, there have been approximately 500 persons who have been subjected to contempt proceedings before the Dutchess County Court pursuant to New York Judiciary Law, Article 19, Section 756 etc.

14. Due to the nature of the relief sought, it will benefit not only the plaintiffs and other persons who have or are now subject to the contempt procedures, but also all those who may face such procedures in the future.

RULE 23 (a) (2)—COMMON ISSUES

15. The common question applicable to all the members of the class is whether their Constitutional rights under

the Fourth, Fifth, Eighth and Fourteenth Amendments are violated by the contempt procedures set forth in Article 19 of the New York Judiciary Law.

RULE 23 (a) (3)—TYPICALITY

16. While the facts on the merits of any particular contempt proceeding before New York courts are unique, there is a common claim typical of the entire class that the contempt procedures set forth in Article 19 of the Judiciary Law are violative of the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

17. There is no conflict betwen the relief sought by the plaintiffs and the interests of the rest of the members of the class. The plaintiffs seeks to secure the right to a hearing and the right to counsel for those persons fined and/or imprisoned pursuant to Judiciary Law, Article 19. In addition, the plaintiffs seek to have the statute declared unconstitutional on the grounds that it violates the ban on "cruel and unusual" treatment and the Equal Protection Clause of the Constitution. The members of the class cannot be hurt by having this right established because in the event fine and/or imprisonment is imposed, they will be entitled to Constitutional safeguards as provided in the Fourth, Fifth, Eighth and Fourteenth Amendments.

RULE 23 (a) (4)—ADEQUACY OF REPRESENTATION

18. The plaintiffs here clearly have a stake in this proceeding which makes their representation adequate. Plaintiffs Vail and McNair have already suffered fines and imprisonment in violation of their Constitutional rights and plaintiff Ward is in imminent danger of imprisonment

and has already been fined pursuant to the challenged statutes. As all three plaintiffs remain judgment debtors, they may become subject to the contempt proceedings in question some time in the future.

19. The plaintiffs are represented by attorneys employed by Legal Services programs funded by the Office of Economic Opportunity. Your deponent is a member of the Bar of this Court and has had experience in class action litigation, *Braxton et al.* v. *Poughkeepsie Housing Authority,* 73 Civ. 4077 (CMM). In addition, I am being assisted by other attorneys employed by Monroe County Legal Assistance Corp. who have extensive experience in class action litigation in the Southern and Western Districts of New York.

RULE 23 (b)(2)

20. If an action meets the prerequisites of Rule 23 (a), it may be maintained as a class action if it further meets the requirements of one or more of the provisions of Rule 23 (b). This action meets the requirements of 23 (b)(2), which provides for maintenance of a class action where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

21. The parties opposing the class, the defendants, have implemented and enforced the provisions of Article 19 of the Judiciary Law with respect to contempt in violation of the plaintiffs Constitutional rights.

22. By failing to provide an opportunity to be heard and the right to counsel, and by having sanctioned plaintiffs in violation of the Eighth and Fourteenth Amendments, the defendants have acted and are acting in the same way as to all persons subject to contempt proceedings pursuant to Article 19, Judiciary Law. As a result, declaratory and injunctive relief, as requested by the plaintiffs, is appropriate.

WHEREFORE, your deponent prays that this Court enter the following:

1. A temporary restraining order restraining the defendants, their successors, agents, employees and all those acting in concert with them from imposing any fines and/or imprisonment on the plaintiffs or the class they represent pursuant to Article 19 of the New York Judiciary Law.

2. An order determining that this action be maintained as a class action under Rule 23 (b)(2) as requested in the complaint.

3. An order convening a three-judge court pursuant to 28 U.S.C. 2281 and 2284.

s/ JOHN D. GORMAN
JOHN D. GORMAN

(Jurat)

Affidavit of Patrick Ward.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

PATRICK WARD, being duly sworn deposes and says:

1. I am a plaintiff in this action and submit this affidavit in support of a motion for a temporary restraining order, a preliminary injunction, a determination that this action may proceed as a class action, and a determination to convene a statutory court of three judges pursuant to Title, U.S.C., Sections 2281 and 2284.

2. I am a citizen of the United States and the State of New York and am presently residing at 94 Washington Street, Poughkeepsie, New York.

3. I am currently unemployed and support myself, my divorced wife and child on unemployment insurance benefits in the amount of $61.00 per week. I pay $30 per week to my divorced wife for the support of herself and my child.

4. In September, 1973, my former wife, Patricia Ward, received medical services from defendant Goran and was charged $125.00 for said services. At that time my wife, Patricia Ward, and I were married and living together.

5. On December 26, 1973, a default judgment was entered against me in the action *Arnold Goran, M.D., P.C.* v. *Patrick Ward,* Index No. 1973/881D in Dutchess County Court for $146.84.

Affidavit of Patrick Ward.

6. On December 27, 1973, I was served with a subpoena issued by Jeffrey S. Graham, Esq., attorney for defendant Goran, which required me to appear in person at the Dutchess County Courthouse on January 11, 1974, to produce books and records and to be examined in connection with defendant Goran's efforts to enforce the December 26, 1973, default judgment.

7. Pursuant to the subpoena, I appeared on January 11, 1974 at the Dutchess County Courthouse. However, defendant Goran's attorney, Jeffrey Graham, did not appear. An employee of the Court contacted Mr. Graham by phone and informed him that I had appeared as directed by the subpoena. Mr. Graham instructed me to come to his office.

8. When I went to Mr. Graham's office on January 11, 1974, Mr. Graham asked me questions regarding my salary, family size, and employment status. Because the subpoena required me to appear at the Dutchess County Courthouse, I refused to answer Mr. Graham's questions in his office and informed him that I would provide all material information to the Court. Mr. Graham became very angry with me and informed me to leave his office.

9. From the latter part of January, 1974, to March, 1974, I left New York State and visited my parents in Florida.

10. On May 15, 1974, I was served with a Notice of Motion for Order Finding Defendant in Contempt of Court ordering me to appear in Dutchess County Court on May 28, 1974. I did not appear in Dutchess County Court on this date or on July 16, 1974, or July 23, 1974.

11. In May, 1974, I contacted Mr. Graham and arranged to satisfy the judgment by paying $10.00 a week to Graham until full payment was made.

Affidavit of Patrick Ward.

12. On July 4, 1974, I was "layed-off" from my job. A few days afterwards, I notified Mr. Graham of this development and told him that I would be unable to make the $10.00 a week payments. Mr. Graham became very angry and told me that "I'll get the money from you one way or another".

13. On or about October 1, 1974, I passed Mr. Graham in the street in Poughkeepsie, New York, and as I walked by he stated, "Some people don't pay their bills and are going to jail".

14. On or about October 3, 1974, I was served with an Order of Contempt issued by defendant Aldrich on September 19, 1974. The Order of Contempt fines me $250.00 and $20.00 costs. Unless I pay this fine within thirty days of service of the Order, I will be subject to imprisonment in the Dutchess County Jail until I pay the entire fine.

15. I currently have no funds available or possessions that could be used to pay the fine imposed. Therefore, I am in imminent danger of imprisonment.

16. If I am imprisoned, I will be unable to collect Unemployment Insurance Benefits. I will be unable to help support my ex-wife and child. I will be unable to seek further employment.

PATRICK N. WARD
PATRICK WARD

(Jurat)

Exhibit "A", Order of Contempt.

At a Special Term of the County Court held in and for the County of Dutchess at the County Courthouse at Poughkeepsie, New York on the 19th day of September, 1974.

PRESENT: HONORABLE RAYMOND E. ALDRICH, JR.

STATE OF NEW YORK
COUNTY COURT : COUNTY OF DUTCHESS

ARNOLD GORAN, M.D., P.C.
74 West Cedar Street
Poughkeepsie, New York

Plaintiff,

—against—

PATRICK WARD
94 Washington Street
Poughkeepsie, New York

Defendant.

Index No. 1973/881D

The defendant in the above entitled action having been personally served with a subpoena Duces Tecum pursuant to section 5224 of the Civil Practice Law and Rules of the State of New York directing him to produce certain records and to appear in person for an examination and a place named therein to be held on the 11th day of January, 1974 the matter having been thereafter adjourned until the 25th day of February, 1974, the defendant having refused and willfully neglected to abide by, obey, nor comply with the terms of said Subpoena Duces Tecum, and that the conduct of the defendant was calculated to and actually did impede, impair and prejudice the rights and remedies of the plaintiff and the plaintiff having duly

moved this Court for an Order finding defendant in Contempt of Court pursuant to Rule 5251 of the Civil Practice Law and Rules, on the grounds that defendant failed to produce certain records for an examination at a place named on the 11th day of January, 1974 and adjourned to the 25th day of February, 1974, as required by Subpoena Duces Tecum, and the said Motion having regularly come on to be heard by me,

Now, upon reading and filing the Notice of Motion and Affidavit of JEFFREY S. GRAHAM, ESQUIRE, and it appearing that in Contempt of this Court the defendant has failed, refused, and willfully neglected to abide by, obey, and comply with the Subpoena Duces Tecum and that his misconduct was calculated to and actually did impair, impede, prejudice and defeat the rights and remedies of the plaintiff.

Upon Motion of JEFFREY S. GRAHAM, ESQUIRE, attorney for plaintiff, it is

ORDERED, that defendant Patrick Ward, has committed the offense charged, and is guilty of misconduct in Contempt of Court, which Contempt was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein; and it is further

ORDERED, that the said defendant, Patrick Ward, as punishment for said Contempt of Court, be and hereby is fined the amount of $250.00 and $20.00 costs, the said amount when paid, with the exception of the costs, to be applied in reduction of the Judgment; and it is further

ORDERED, that the defendants may purge themselves of the aforesaid Contempt by paying to the plaintiff's attorney the sum of $250.00 plus $20.00 costs within thirty (30)

days after the service upon the defendant of a certified copy of this Order with Notice of Entry thereof; and it is further,

ORDERED, that in the event that the defendant fails to purge himself of this Contempt, as provided herein, within the time specified the plaintiff may apply ex parte to this Court upon proof by affidavit of the defendant's failure to purge himself, as provided herein for an Order directing the sheriff of any County wherein the defendant may be found, to detain the defendant in close custody in the common or County jail of said County, until he shall have paid the entire fine imposed herein, or any part of such fine that remains unpaid at the time of said commitment, or until he shall have paid the entire fine imposed herein, or any part of such fine that remains unpaid at the time of said commitment, or until he shall have otherwise been discharged according to law.

ENTER

s/ RAYMOND E. ALDRICH, JR.
RAYMOND E. ALDRICH, JR.
Certification by Attorney

Temporary Restraining Order.

[SAME TITLE]

Upon the complaint filed herein, the affidavits of Patrick Ward and John D. Gorman, sworn to under oath, and upon the representations made by counsel during the hearing on Plaintiffs Order to Show Cause for a Temporary Restraining Order held on November 6, 1974, and it appearing therefrom that defendants unless restrained will arrest and imprison plaintiff Ward pursuant to New York State Judiciary Law, Article 19, and that immediate and irreparable injury will be done to plaintiff Ward if he is arrested and imprisoned,

IT IS HEREBY ORDERED that defendants, their successors, agents, assignees, principals, assignors and persons acting in concert with them, are temporarily restrained pursuant to 28 U.S.C. 2284 (3), from arresting and imprisoning plaintiff Ward pursuant to New York State Judiciary Law Article 19, until a hearing and determination is made by the full three-judge district court or until this court revokes the temporary restraining order.

Dated 4.00 o'clock P.M.
November 8th, 1974.

s/ JOHN M. CANNELLA
United States District Judge

Order to Show Cause, January 8, 1975.

[SAME TITLE]

Upon the Affidavits of Leslie Nameth, McKinley Humes, Joseph Rabasco and Joanne Harvard, and their attorney, John D. Gorman, and upon the Complaint in this action, it is

ORDERED, that the plaintiff, defendants, Herbert H. Redl, d/b/a H. R. Redl's Auto Body Works, Gladys Rabasco and Hon. W. Vincent Grady, and Domestic Finance, show cause before this Court at a Civil Motion Term to be held at the United States Courthouse, Foley Square, New York, New York, Room 1001, on the 27th day of January, 1975, at 4:00 P.M. or as soon thereafter as counsel can be heard, why an order should not be made herein, granting the motion of proposed intervenor-plaintiffs Leslie Nameth, McKinley Humes, Joseph Rabasco, and Joanne Harvard,

(a) Pursuant to Rules 23 and 24 (b) of the Federal Rules of Civil Procedure, to intervene in this action as named party plaintiffs,

(b) Pursuant to Rules 19a, 20a, and 21 to add as party defendants, Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works; Hon. W. Vincent Grady, Gladys Rabasco, and Domestic Finance.

(c) Pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction enjoining the defendants and Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, from imposing any fines and/or imprisoning Leslie Nameth, McKinley Humes, and Joanne Harvard, under color of Article 19, Sections 756, 757, 765, 767, 769, 770, 771,

772, 773, 774, and 775 of the New York Judiciary Law and enjoining defendants Aldrich, Juidice and Quinlan from imposing any fines and/or imprisoning Leslie Nameth, McKinley Humes, and Joanne Harvard, pursuant to Article 19 of the Judiciary Law, pending a final determination of this action and waiving the security requirement of Rule 65 (c);

(d) Pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction enjoining the defendants and Hon. W. Vincent Grady and Gladys Rabasco from proceeding with Gladys Rabasco's application for an Order of Contempt against Joseph Rabasco, pursuant to Article 19 of the New York Judiciary Law in *Gladys Rabasco* v. *Joseph Rabasco,* Index No. 3087/1974, until an attorney has been assigned to represent Joseph Rabasco in the contempt proceeding pending a final determination of this action and waiving the security requirement of Rule 65 (c).

(e) Pursuant to Rules 6(b), 7, 8, 23 and 24 of the Federal Rules of Civil Procedure, for an order allowing a reasonable extension of time to file a proposed intervenor's complaint, and/or deeming the affidavits of Leslie Nameth, McKinley Humes, Joseph Rabasco, and Joanne Harvard, to be a verified pleading pending determination of this motion.

The grounds for the motion are that it is appropriate for Leslie Nameth, McKinley Humes, Joseph Rabasco, and Joanne Harvard, members of the alleged class of plaintiffs in the main action, to intervene at this early stage of the proceedings, since the facts of their cases, the legal

claims they make, and their claims for relief are all substantially identical to those of the named plaintiffs. Further, Leslie Nameth, McKinley Humes, and Joanne Harvard are in dire need of immediate individual relief as they have been threatened with imprisonment within the immediate future by the defendants under the law challenged in the main action. Joseph Rabasco is in dire need of immediate individual relief as he is in danger of being held in contempt of court pursuant to Article 19 of the New York Judiciary Law and, as a result, he is in danger of incarceration and/or fine without the benefit of assigned counsel as he is financially unable to retain an attorney. Leslie Nameth, McKinley Humes, Joseph Rabasco, and Joanne Harvard are without sufficient funds, therefore, a waiver of security requirements should be granted.

IT IS HEREBY ORDERED, that it appearing to the Court that the defendant Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, will cause irreparable injury, damage and loss to Leslie Nameth and defendant Montgomery will cause irreparable injury, damage and loss to McKinley Humes, and defendant Domestic Finance will cause irreparable injury, damage and loss to Joanne Harvard, unless they are restrained from imprisoning Leslie Nameth, McKinley Humes, and Joanne Harvard, pursuant to Article 19 of the New York Judiciary Law, before adverse parties and their attorneys can be heard in opposition, defendants, Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, and Domestic Finance, their subordinates, agents and attorneys, be and they are hereby Restrained from imprisoning Leslie Nameth and McKinley Humes pursuant to Article 19, Sections 756, etc., of the New York Judiciary Law, pending a final hearing and determination of their motion for a preliminary injunction. by a three-judge court or otherwise, as determined (see the Temporary Restraining Order of Nov. 8, 1974)

Order to Show Cause, January 8, 1975.

IT IS HEREBY ORDERED, that it appearing to the Court that the Hon. W. Vincent Grady and Gladys Rabasco, will cause irreparable injury, damage and loss to Joseph Rabasco; they are therefore restrained from proceeding with Gladys Rabasco's application pursuant to Article 19 of the New York Judiciary Law for an Order of Contempt against Joseph Rabasco, in *Gladys Rabasco* v. *Joseph Rabasco,* Dutchess County Supreme Court, Special Term, Index No. 3087/1974, unless counsel is assigned to Joseph Rabasco pending a final hearing and determination of his motion for a prelminary injunction, by a three-judge court or otherwise, as determined (see the Temporary Restraining Order of Nov. 8, 1974)

ORDERED, that the security requirements of Rule 65 of the Federal Rules of Civil Procedure be waived, and it is further

ORDERED that this Order to Show Cause, together with the papers upon which it is granted be served personally upon the defendants or the attorneys for defendants on or before the 9th day of January, 1975, by 5:00 P.M.

s/ THOMAS P. GRIESA
United States District Judge

Dated: New York, New York
January 8, 1975
Issued at 3:30 P.M.

Affidavit of Leslie Nameth (Annexed).

[SAME TITLE]

LESLIE NAMETH, being duly sworn, deposes and says as follows:

1. Plaintiff Nameth is a citizen of the United States and the State of New York. He resides at 136 Church Street, Poughkeepsie, New York, with his wife and two children.

2. Plaintiff Nameth is 32 years of age.

3. In 1971, Plaintiff Nameth was involved in an automobile accident. Plaintiff Nameth hired defendant H.H. Redl's Auto Body Works to tow his car at a fee of $50. After the automobile was towed, Plaintiff Nameth paid defendant Redl's $10. Plaintiff Nameth made about $20 in additional payments to defendant Redl's at a later time.

4. On July 31, 1974, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works* v. *Leslie Nameth* in favor of Herbert H. Redl and against Plaintiff Nameth for $69.82.

5. On August 8, 1974, Thomas A. Reed, Attorney for defendant Redl served a subpoena duces tecum, requiring Plaintiff Nameth to appear on August 30, 1974, before a notary public at 75 Market Street, Poughkeepsie, New York, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of July 31, 1974, and to produce certain records.

6. When Plaintiff Nameth failed to appear on August 30, 1974, Defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757(1) ordering Plaintiff Nameth to appear at the Dutchess County Court on September 24, 1974, at 10:00 a.m. to "show cause why he should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

7. When Plaintiff Nameth failed to appear on September 10, 1974, the hearing on the Order to Show Cause was adjourned to October 8, 1974, at 10:00 a.m.

8. When Plaintiff Nameth failed to appear in County Court on October 8, 1974, Defendant Juidice issued an Order of Contempt, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Nameth in contempt.

9. When Plaintiff Nameth failed to comply with the Order of Contempt, Defendant Juidice issued an *ex parte* Commitment Order pursuant to Judiciary Law Article 19, Section 756.

10. Plaintiff Nameth is in imminent danger of being imprisoned pursuant to the Order of Contempt.

11. At the present time Plaintiff Nameth refuses to pay the fine because he maintains that Defendant Redl did not give him a proper credit on the towing charges for the new tires on the automobile.

12. Plaintiff Nameth contends that the imposition of the fine and the punishment of imprisonment in the event the fine is unpaid is violative of his rights secured by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

13. With respect to the fine imposed pursuant to the Order of Contempt, Plaintiff Nameth contends that Defendant Juidice wrongfully imposed the fine without affording him the procedural right to answer Defendant Redl's charge of contempt or to challenge the amount of the fine imposed in violation of his right to due process secured by the Fifth and Fourteenth Amendments.

14. Plaintiff Nameth has not been apprised of his right to counsel in this proceeding in violation of the right to counsel secured by the Fifth and Fourteenth Amendments.

15. Plaintiff Nameth contends that the imprisonment that may occur due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

16. No previous applications for similar relief have been made.

LESLIE NAMETH
LESLIE NAMETH

(Jurat)

Affidavit of McKinley Humes (Annexed).

[SAME TITLE]

McKinley Humes, being duly sworn, deposes and says as follows:

1. Plaintiff Humes is a citizen of the United States and the State of New York. He resides at 22 Delafield Street, Poughkeepsie, New York.

2. Plaintiff Humes is 47 years of age.

3. On or about 1966, Plaintiff Hume's common-law wife, Florence S. Humes, received medical services from Defendant Montgomery, Jr. M.D.

4. On April 19, 1973, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *George Montgomery, Jr., M.D.* v. *McKinley Humes and Florence S. Humes,* in favor of George Montgomery, Jr., M.D. and against Plaintiff Humes and Florence S. Humes for $233.84.

5. On June 12, 1973, Thomas A. Reed, Attorney for Defendant Montgomery served by mail a subpoena duces tecum, requiring Plaintiff Humes to appear on June 22, 1973, before a notary public at 75 Market Street, Poughkeepsie, New York, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of April 19, 1973, and to produce certain records.

6. When Plaintiff Humes failed to appear on June 22, 1973, Defendant Juidice issued an Order to Show Cause

pursuant to Judiciary Law Article 19, Section 757(1) ordering Plaintiff Humes to appear at the Dutchess County Court on July 17, 1973, at 10:00 a.m. to "show cause why he should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

7. When Plaintiff Humes failed to appear on July 17, 1973, the hearing on the Order to Show Cause was adjourned to July 31, 1973, at 10:00 a.m.

8. When Plaintiff Humes failed to appear in County Court on July 17, 1973, Defendant Juidice issued an Order of Contempt on August 14, 1973, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Humes in contempt and ordering:

> Ordered that the said defendant McKinley Humes for his misconduct and willful contempt be and he is hereby fined the sum of $221.84 to be paid to the plaintiff, besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the plaintiff, by making installment payments in the amount of Twenty ($20.00) dollars per week, commencing one week after service of a certified copy of this order. Upon payment as aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

9. Defendant Juidice issued the Order of Contempt based upon the following:

> Upon reading and filing the Order to Show Cause dated the 27th day of June, 1973, with due proof of service thereof on the defendant, McKinley Humes, the affirmation of Thomas A. Reed dated the 25th day of June, 1973, and upon all the pleadings and proceedings heretofore had herein, and after hearing Reed & Reed, Esqs., Thomas A. Reed, of counsel, for the plaintiff in support of said motion, and there being no opposition thereto . . .

10. A copy of this Order of Contempt was served on Plaintiff Humes in December, 1974.

11. When Plaintiff Humes failed to comply with the Order of Contempt, Defendant Juidice issued an *ex parte* commitment order pursuant to Judiciary Law Article 19, Section 756.

12. At the present time Plaintiff Humes is unemployed and does not receive Unemployment Insurance Benefits. Plaintiff Humes has been unemployed since June, 1974. He maintains himself on 10% U.S. Government Veteran's Disability payments of $32 per month. He does odd jobs for his landlord to pay for his rent. He has no other funds available or possessions that could be used to pay the fine imposed.

13. Plaintiff Humes is in imminent danger of being imprisoned pursuant to the Order of Contempt because he is financially unable to pay the fine imposed.

14. Plaintiff Humes contends that the imposition of the fine and the punishment of imprisonment in the event the fine is unpaid is violative of his rights secured by the

Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

15. With respect to the fine of $221.84 plus 10.00 costs, Plaintiff Humes contends that Defendant Juidice wrongfully imposed the fine without affording him the procedural right to answer Defendant Montgomery's charge of contempt or to challenge the amount of the fine imposed in violation of his right to due process secured by the Fifth and Fourteenth Amendments.

16. Plaintiff Humes has not been apprised of his right to counsel in this proceeding nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the right to counsel secured by the Fifth and Fourteenth Amendments.

17. The punishment of imprisonment in the event the fine is unpaid is violative of the Equal Protection clause of the Fourteenth Amendment in that it works an invidious discrimination against those who are too poor to pay the fine. Plaintiff Humes is one who is indigent and unable to pay the fine and, as a result, he is faced with the imminent danger of imprisonment.

18. Plaintiff Humes contends that the imprisonment that may occur due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

19. No prior applications for similar relief have been made.

s/ Mc Kinley Humes Sr.

(Jurat)

Exhibit —Order of Contempt.

AT a Special Term of the County Court held in and for the County of Dutchess at Poughkeepsie, New York, on the 14th day of August, 1973.

Present:

HON. RAYMOND E. ALDRICH, JR.
DUTCHESS COUNTY JUDGE

Index No. 1973/1667

COUNTY COURT
COUNTY OF DUTCHESS

GEORGE MONTGOMERY, JR., M.D.,

Plaintiff

—against—

MCKINLEY HUMES & FLORENCE S. HUMES,

Defendant

Upon reading and filing the Order to Show Cause dated the 27th day of June, 1973, with due proof of service thereof on the defendant, the affirmation of Thomas A. Reed dated the 25th day of June, 1973, and upon all the pleadings and proceedings heretofore had herein, and after hearing Reed & Reed, Esqs., Thomas A. Reed, of counsel, for the plaintiff in support of said motion, and there being no opposition thereto, it is

ORDERED that the defendant McKinley Humes is adjudged of a contempt of this court, which contempt defeated and impaired the rights and remedies of the plaintiff, and it is further

Exhibit—Order of Contempt.

ORDERED that the said defendant McKinley Humes for his misconduct and willful contempt be and he is hereby fined the sum of $221.84 to be paid to the plaintiff, besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the plaintiff, by making installment payments in the amount of Twenty ($20.00) Dollars per week, commencing one week after service of a certified copy of this order. Upon payment as aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

ENTER,

/s/ Raymond E. Aldrich, Jr.
Dutchess County Judge

(ATTORNEY'S CERTIFICATION)

Affidavit of Joanne Harvard (Annexed).

[SAME TITLE]

JOANNE HARVARD, being duly sworn, deposes and says as follows:

1. Plaintiff Harvard is a citizen of the United States and the State of New York. She resides at 78 Academy Street, Poughkeepsie, New York.

2. Plaintiff Harvard is 21 years of age.

3. On December, 1972, plaintiff Harvard signed a retail installment contract with Balco Furniture Company for $637.81. Upon information and belief, Balco Furniture Company assigned this contract to defendant Domestic Finance.

4. Plaintiff Harvard made regular payments pursuant to this contract until Franklin Green, the co-signer on the retail installment contract indicated to plaintiff Harvard that he would make all future payments on the contract.

5. On March 20, 1974, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *Domestic Finance* v. *Franklin Green and Joanne Harvard* in favor of Domestic Finance and against plaintiff Harvard for $413.40.

6. On May 1, 1974, Charles P. Morrow, Attorney for defendant Domestic Finance served a subpoena duces tecum, requiring plaintiff Harvard to appear on May 24, 1974, before him at 40 Cannon Street, Poughkeepsie, New York,

for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of March 30, 1974, and to produce certain records.

7. When plaintiff Harvard failed to appear on May 24, 1974, defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757(1) ordering plaintiff Harvard to appear at the Dutchess County Court on August 13, 1974, at 9:30 a.m. to "show cause why she should not be punished as for contempt for violation of and non-compliance with the said subpoena in that she failed to appear or respond pursuant thereto . . ."

8. When plaintiff Harvard failed to appear on August 13, 1974, the hearing on the Order to Show Cause was adjourned to August 27, 1974.

9. When plaintiff Harvard failed to appear in County Court on August 27, 1974, defendant Juidice issued an Order of Contempt pursuant to Judiciary Law Article 19, Section 770 holding plaintiff Harvard in contempt.

10. When plaintiff Harvard failed to comply with the Order of Contempt, defendant Juidice issued an *ex parte* Commitment O rder pursuant to Judiciary Law Article 19, Section 756.

11. On or about November, 1974, deputies of defendant Quinlan arrested plaintiff Harvard pursuant to the Commitment Order and then committed her to the Dutchess County Jail.

12. The deputies of defendant Quinlan arrested and held plaintiff Harvard in the Dutchess County Jail pursuant to Judiciary Law Sections 756 and 774.

13. The plaintiff was released from Dutchess County Jail pursuant to Judiciary Law Section 774, after her mother lent her funds to pay the fine totalling $294.25.

14. The sum of $294.25 was delivered to a deputy of defendant Quinlan who, upon information and belief, delivered the money to defendant Domestic Finance pursuant to Section 773 of the Judiciary Law.

15. By virtue of the foregoing, plaintiff Harvard was wrongfully imprisoned for approximately five hours, suffered mental anguish, shame and humiliation, damage to her character and reputation, damage to her credit standing, and was wrongfully deprived of $294.25 in violation of her Fifth, Eighth, and Fourteenth Amendment rights to the United States Constitution.

16. Plaintiff Harvard contends that the imposition of the fine and the punishment of imprisonment in the event the fine is unpaid is violative of her rights secured by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

17. With respect to the fine of $294.25 costs, plaintiff Harvard contends that Defendant Juidice wrongfully imposed the fine without affording her the procedural right to answer defendant Domestic Finance's charge of contempt or to challenge the amount of the fine imposed in violation of her right to due process secured by the Fifth and Fourteenth Amendments.

18. Plaintiff Harvard has not been apprised of her right to counsel in this proceeding nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for persons in violation of the right

to counsel secured by the Fifth and Fourteenth Amendments.

19. Plaintiff Harvard contends that the imprisonment that occurred due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

20. After plaintiff Harvard was released from the Dutchess County Jail, she made weekly payments on the remaining indebtedness to Charles P. Morrow, attorney for defendant Domestic Finance.

21. On or about December 1, 1974, plaintiff Harvard lost her job at the Eden Park Nursing Home due to illness. Plaintiff Harvard contacted Charles P. Morrow and indicated that she would not be able to make the weekly payments.

22. On December 20, 1974, Charles P. Morrow notified plaintiff Harvard by mail that further legal action would be taken if the weekly payments were not made.

> LAST WARNING BEFORE
> FURTHER LEGAL ACTION
> WILL BE TAKEN AGAIN!!!
>
> PER OUR PHONE CONVERSATION ON WEDNESDAY, DEC. 18th, 1974, YOU INFORMED OUR OFFICE THAT YOU ARE NO LONGER EMPLOYED. WE SUGGEST VERY STRONGLY THAT THE $5.00, FROM WEEK OF 12/4/74, $10.00 FROM WEEK OF 12/11/74 AND $10.00 FROM WEEK OF 12/18/74 BE SENT IN IMMEDIATELY!!! REGARDLESS

23. On January 6, 1975, an individual from the office of Charles P. Morrow contacted by phone the plaintiff Har-

vard's mother, Maggie Ruth Harvard, and told her that her daughter would be imprisoned again if she did not make the weekly payment.

24. On January 7, 1975, plaintiff Harvard contacted Charles P. Morrow by phone and asked him if she would be imprisoned again. Mr. Morrow stated that he had no other alternative if she did not make the payments.

25. Plaintiff Harvard currently supports herself on $94.00 per month she receives from the Dutchess County Department of Social Services. She has no assets or funds available to make the weekly payments to Charles P. Morrow.

26. Plaintiff Harvard is in danger of repeated incarceration pursuant to Article 19 and contempt procedures.

27. Plaintiff Harvard prays that this Court:

(1) Enter judgment on behalf of plaintiff Harvard in the amount of $100.00 for her unlawful imprisonment.

(2) Enter judgment on behalf of plaintiff Harvard in the amount of $294.25 against defendant Domestic Finance, the recipient of the fine unlawfully imposed in violation of the Fifth, Eighth, and Fourteenth Amendments.

28. No prior application for similar relief have been made.

Joanne Harvard
JOANNE HARVARD

(Jurat)

Affidavit of Joseph Rabasco (Annexed).

[SAME TITLE]

JOSEPH RABASCO, being duly sworn, deposes and says as follows:

1. Plaintiff Joseph Rabasco is a citizen of the United States and the State of New York. He resides at 3 Midge Drive, Wappingers, Falls, New York.

2. Mr. Rabasco is 60 years of age.

3. In October, 1974, Joseph Rabasco's wife, Gladys Rabasco, commenced a divorce proceeding against him in the Dutchess County Supreme Court (*Rabasco* v. *Rabasco,* Index No. 3087/1974). Upon service of the Summons in the divorce action, Mrs. Rabasco also served motion papers for counsel fees of $1,500.00, alimony of $50.00 a week, support of $35.00 a week for each of the three infant children of the marriage, and exclusive possession of the marital home.

4. The motion came on for hearing before the Hon. W. Vincent Grady, a Justice of the Supreme Court of the State of New York, on November 4, 1974 and shortly thereafter Justice Grady entered an order requiring Joseph Rabasco to make support payments of $90.00 a month for his children and to make mortgage payments on the marital home, possession of which was awarded to Mrs. Rabasco, in addition to attorneys fees of $250.00. (See attached order).

5. After Justice Grady's Order was entered, Mr. Rabasco lost his job at which he was making approximately

$200.00 a week net and he then began receiving unemployment insurance benefits of $95.00 a week.

6. Due to his drastic reduction in income, Mr. Rabasco was unable to comply with Justice Grady's Order in full.

7. On December 28, 1974, Joseph Rabasco received an Order to Show Cause, signed by Justice Grady on December 23, 1974, in which Mrs. Rabasco was seeking an order of contempt for Mr. Rabasco's failure to comply with Justice Grady's Order for support, counsel fees and possession of the marital home. The Order to Show Cause was made returnable before Justice Grady on January 6, 1975.

8. On January 6, 1975, Joseph Rabasco appeared before Justice Grady and asked Justice Grady to assign an attorney to represent him in the contempt proceeding as he did not have sufficient funds to retain one. Justice Grady refused stating that he could not assign a lawyer. Justice Grady then adjourned the matter so Mr. Rabasco could retain a lawyer.

9. Prior to the hearing on January 6, 1975, Mr. Rabasco had contacted over five attorneys in the Poughkeepsie area for the purpose of representation in the matter. The retainer fees required ranged from $500.00 to $1,200.00 which were far in excess of Mr. Rabasco's available income or assets.

10. Mr. Rabasco's only income benefits and his only assets are his home, jointly owned with his wife, and an automobile.

11. Joseph Rabasco's entire income is used to make monthly first mortgage payments of $248.00 and second

mortgage payment of $94.00 and gas and electric bills for service to the family home, food for the family and insurance on the house. By virtue of the foregoing, Joseph Rabasco is financially incapable of retaining an attorney.

12. Joseph Rabasco contends that he is in danger of imprisonment and/or fine without the benefit of assigned counsel in violation of his rights secured by the Fifth, and Fourteenth Amendments to the Constitution.

13. Joseph Rabasco further contends that Article 19 of the New York Judiciary Law is in violation of his Constitutional Rights in that there is no provision for assignment of counsel for indigent persons facing imprisonment and/or fine pursuant to the statute.

14. Joseph Rabasco is proceeding by way of an Order to Show Cause and is seeking emergency relief because he may be facing imprisonment and/or fine as a result of his wife's application for an order of contempt in *Rabasco* v. *Rabasco*.

15. No prior application for the relief herein sought has been made.

JOSEPH RABASCO

(Jurat)

Exhibit—Order (of Support).

At a Special Term of the Supreme Court held in and for the County of Dutchess at the Courthouse in Poughkeepsie, New York, on the day of November, 1974

PRESENT:

HON. W. VINCENT GRADY,
Justice,

STATE OF NEW YORK
SUPREME COURT : DUTCHESS COUNTY

Index No. 3087/1974

GLADYS RABASCO,

Plaintiff,

—against—

JOSEPH RABASCO,

Defendant.

A motion having been made for temporary alimony, child support, counsel fees and exclusive possession of the marital premises, and due notice of this motion having been given;

Now, upon reading and filing the Notice of Motion dated the 14th day of October, 1974, the affidavits of GLADYS RABASCO and IRA A. PERGAMENT, ESQ., sworn to the 14th day of October, 1974, and the papers submitted by JOSEPH RABASCO, in opposition thereto, and due deliberation having been had;

Exhibit—Order (of Support).

NOW, on motion of IRA A. PERGAMENT, ESQ., attorney for the plaintiff, it is;

ORDERED, that the plaintiff is awarded the sum of $90.00 per week for the support and maintenance of the three infant children of the marriage, payments to commence as of the date of the decision, November 6th, 1974, and to made on Friday of each week thereafter, and it is further,

ORDERED, that the defendant, JOSEPH RABASCO, is to continue making payments of mortgage interest and amortization and payments of realty taxes pending the trial of this action, and it is further,

ORDERED, that the plaintiff have temporary exclusive possession of the marital residence, and it is further,

ORDERED, that plaintiff have temporary custody of the children of the marriage and defendant is granted rights of visitation which shall be agreed upon between the parties and in the event that the parties are unable to agree, the Court, upon application, will fix visitation rights, and it is further,

ORDERED, that the plaintiff receive the sum of $250.00 for counsel fees which shall be paid within 30 days after service of a copy of the Order herein with Notice of Entry thereon, and it is further,

ORDERED, that plaintiff shall have leave to apply to the trial Court for additional counsel fees, and it is further,

ORDERED, that plaintiff is not entitled to temporary alimony pending the trial of this action.

Dated: Poughkeepsie, N.Y.
November , 1974.

ENTER,
s/ W. VINCENT GRADY
Justice of the Supreme Court

Opinion (Justice Grady).

STATE OF NEW YORK
SUPREME COURT : DUTCHESS COUNTY

INDEX No. 1974/3087

Motion Date—Nov. 4, 1974

Motion Cal. #43

GLADYS RABASCO,

Plaintiff,

—against—

JOSEPH RABASCO,

Defendant.

GRADY, J.

Motion for temporary alimony, child support, counsel fees and exclusive possession of the marital premises is disposed of as follows:

No award is made for temporary alimony since it appears that the plaintiff is both employed and self-employed part-time and has sufficient earnings to maintain herself pending the trial of this action.

Plaintiff is awarded the sum of $90.00 per week for the support and maintenance of the three (3) infant children of the marriage, payments to commence as of the date of this decision and to be made on Friday of each week.

It appears that the defendant has been paying the realty taxes, and mortgage interest and amortization on the marital residence and defendant is directed to continue making such payments pending the trial of this action. Plaintiff is awarded temporary exclusive possession of the marital residence.

Opinion (Justice Grady).

Plaintiff is awarded temporary custody of the children of the marriage and defendant is granted rights of visitation which shall be agreed upon between the parties and in the event that the parties are unable to agree, the Court, upon application, will fix visitation rights.

Plaintiff is awarded the sum of $250.00 for counsel fees which shall be paid within (30) days after service of a copy of the order herein with notice of entry thereon. Plaintiff shall have leave to apply to the trial court for additional counsel fees.

Submit order on notice.

Dated: November 6, 1974.

Vincent Grady
VINCENT GRADY, J. S. C.

To: IRA A. PERGAMENT, Esq.
Attorney for Plaintiff
2 Cannon Street
Poughkeepsie, New York 12601
JOSEPH RABASCO
3 Midge Drive
Wappingers Falls, New York

Exhibit—Order to Show Cause, State Court.

At a Special Term of the Supreme Court held in and for the County of Dutchess at the Courthouse in the City of Poughkeepsie, New York, on the 23 day of December, 1974.

Present: Hon. W. Vincent Grady, Justice.

STATE OF NEW YORK

SUPREME COURT
Dutchess County

Index No. 3087/1974

Gladys Rabasco,

Plaintiff,

against

Joseph Rabasco,

Defendant.

On reading and filing the annexed affidavits of Gladys Rabasco and Ira A. Pergament, Esq., both verified the 19th day of December, 1974, the Order made herein by the Hon. W. Vincent Grady dated November 6th, 1974 and entered December 3, 1974, a copy of which is hereto annexed and marked Exhibit "A", and upon all the other papers and proceedings had herein, and it appearing to the Court that the defendant Joseph Rabasco is in default in the payment of the sum of $630.00 alimony and child support, which became due under the terms of the said Order, a further sum for the payment of mortgage principal and interest for the month of December, 1974, and that the defendant Joseph Rabasco has not given the plain-

tiff Gladys Rabasco exclusive possession of the marital residence under the terms of the said order, and it appearing presumptively to the satisfaction of the Court that the defendant Joseph Rabasco has given no security and that sequestration proceedings have not been instituted because they would be ineffectual and that the rights and remedies of the plaintiff Gladys Rabasco have been impaired, impeded, prejudiced and defeated

Let the defendant Joseph Rabasco, or his attorney, show cause before one of the Justices of this Court at a Special Term thereof, to be held at the Dutchess County Courthouse in Poughkeepsie, New York, on the 6 day of January, 1975, at 9:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, why an Order should not be made and entered:

(a) Adjudging the defendant Joseph Rabasco to be in contempt of this Court for his failure to comply with the terms of the Order of this Court filed and entered by the Hon. W. Vincent Grady on December 3rd, 1974, in that the defendant Joseph Rabasco has defaulted in the payments of temporary alimony and child support in the sum of $630.00 beginning as of November 6th, 1974, the date payments were directed to commence pursuant to said Order, and ending December 13th, 1974, the date of the within motion; and in that he has further defaulted in the payment of mortgage principal and interest for the month of December, 1974, and in that he has further defaulted by not giving exclusive possession of the marital residence to the plaintiff under said Order, and punishing the defendant Joseph Rabasco therefor for said contempt, and,

(b) Awarding the plaintiff Gladys Rabasco a suitable counsel fee for bringing on and prosecuting these proceedings, and,

(c) For such other and further relief as to the Court may seem just and proper.

Exhibit—Order to Show Cause, State Court.

Sufficient reason appearing therefor, let service of a certified copy of this Order and of the exhibits upon which it is based, on the defendant JOSEPH RABASCO, on or before the 29 day of Dec. 197 , at 6 o'clock in the afternoon of said day, be deemed sufficient service.

Dated: Poughkeepsie, N.Y.
December 23, 1974.

ENTER,

W. VINCENT GRADY
Justice of the Supreme Court

Affidavit in Opposition of Thomas A. Reed.

[SAME TITLE]

THOMAS A. REED, being duly sworn, deposes and says:

1. That I am an attorney duly admitted to practice law in the State of New York and duly admitted and qualified to practice law in the United States District Court for the Southern District of New York.

2. That I make this Affidavit in opposition to the motion of the plaintiffs Richard Russell, Jr., Helen Thorpe and Robert Harrell to intervene as party plaintiff's and in opposition to the motion of plaintiffs Leslie Nameth and McKinley Humes for a preliminary injunction, temporary restraining order and intervention and their Notice to Amend Affidavits, said opposition made on behalf of the defendants Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, Alexander Paulsen and Douglas Paulsen, d/b/a Hudson View Park Company, George T. C. Way, M.D., and George Montgomery, Jr., M.D.

3. That I oppose the motion of the plaintiffs' Richard Russell, Jr., Helen Thorpe and Robert Harrell on the grounds that the facts of their cases, the legal claims they make, and their claims for relief are not substantially identical to those of the other named plaintiffs, and particularly oppose the request that the affidavits of said defendants be deemed verified pleadings inasmuch as such they are not complete, the affidavit of the plaintiff Russell does not set forth all of t he facts as hereinafter more fully alleged and the Affidavit of the plaintiff Harrell is not made by the real party in interest seeking to intervene in this action.

4. That I oppose the said motion to intervene for more specific reasons as follows:

a) The interveneing plaintiffs and each of them afforded ample opportunity, upon notice, to attend and appear before the Court and to plead their indigency, if that be the case.

b) Plaintiff Russell was apprised of his right to counsel in these proceedings and was in fact represented by counsel therein, namely Mid-Hudson Valley Legal Services Project, by one David Effron, Esq., who contacted your affiant on March 26, 1974, and so stated he represented said plaintiff and about whom your affiant on two other occasions discussed with Mr. Effron his representation of said plaintiff.

c) That the plaintiff were in fact able to pay the fines imposed, which fine has not been received by the defendant Hudson View Park Company and which fines as to plaintiffs Russell, Thorpe and Harrell will be or have been applied against lawful judgements obtained against each of them by the defendants.

d) That the prayers for relief in each of the plaintiffs' affidavits requests judgements in the sum of $100,000.00 but in no instance does it state against whom the judgement is sought; that the first decretal provision of the Order to Show Cause signed by Hon. Thomas P. Griesa on January 8, 1975, did not restrain George Montgomery, Jr., M.D. from imprisoning anyone and said defendant has done no act violating said order nor any act violative of the rights of the plaintiff McKinley Humes and he prays for a judgement against said defendants should be dismissed as no damages could have arisen therefrom.

e) That the individual defendants, by and through their attorneys, did not and have not fined, imprisoned or otherwise violated the constitutional rights of the plaintiffs or

any of them and, have merely invoked the laws of the State of New York in an attempt to enforce the collection of sums due them that had been reduced to judgement and, therefore, no judgement should be allowed against them or any of them, and this proceeding should be dismissed as to each one of them.

f) That the prayers for relief in the Affidavits of the intervening plaintiffs McKinley Humes and Leslie Nameth as to seeking judgements against the respective defendants Montgomery and Redl are inconsistent with the relief sought and requested in the Notice of Motion and the Motion and the same should be disregarded or otherwise dismissed, particularly in that said defendants did not arrest, imprison, or otherwise violate the rights of the said plaintiffs or either of them, and have not or could not have been damaged thereby, and based upon the foregoing because Court lacks subject matter jurisdiction as to said defendants and they should not be added as party defendants.

5. That as to the motion to intervene on behalf of the plaintiffs Russell, Thorpe and Harrell, and to add defendants' Alexander and Douglas Paulsen, George T. C. Way, M.D. and Herbert H. Redl, in that said defendants did no acts involving the arrest, imprisonment or otherwise violative of the rights of the plaintiffs and, therefore, did not damage said plaintiffs, and in that the prayers for relief in the respective affidavits of the said plaintiffs otherwise allege damages in each case in a sum less than $10,000.00 the Court lacks subject matter jurisdiction as to said defendants and they, therefore, should not be added as parties defendant, and the motion as to them should be dismissed.

WHEREFORE, deponent prays that this Court in all respects deny the motions of the intervening plaintiffs as re-

gards the defendants Montgomery, Way, Redl, and Alexander Paulsen and Douglas Paulsen, that said defendants not be added parties defendant, and that the relief prayed for in the respective intervening plaintiffs' affidavits be denied.

Thomas A. Reed
THOMAS A. REED

(Jurat)

Affidavit in Opposition to Order to Show Cause.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF DUTCHESS } ss.:

CHARLES P. MORROW, Esq., being duly sworn, deposes and says:

1. He is an attorney at law duly admitted to practice in the State of New York and a partner in the law firm of Gilday and Morrow, attorneys for Domestic Finance, a proposed defendant in the above captioned action.

2. That as attorney of record in a previous action of Domestic Finance against Joanne Harvard, a proposed intervenor in this action, he is familiar with the facts and circumstances out of which the present action was evolved.

3. That he has read the affidavit of Joanne Harvard, the proposed intervenor, in support of her order to show cause to intervene in this action and for injuncture relief, and that he makes this affidavit in answer to her order to show cause and in support of the relief requested by the proposed defendant, Domestic Finance, for judgment against said Joanne Harvard in the event that she is permitted to intervene in this action, as demanded in the counterclaim hereinafter interposed in this affidavit.

4. On March 20, 1974, default judgment was entered in the City Court of Poughkeepsie for Domestic Finance Corporation against Joanne Harvard in the amount of $413.40. A transcript of the same was duly filed with the County Clerk of Dutchess County. Joanne Harvard had been properly served in the action, but had failed to appear.

5. An information subpoena was duly served upon Joanne Harvard on or about May 1, 1974. She failed to appear or answer questions in the subpoena. An order to show cause was issued from the County Court of Dutchess County to show cause why said Joanne Harvard should not be punished for contempt. It was duly served upon her on or about July 29, 1974; and she failed to appear thereafter. A judgment of contempt and fine order in the amount of $270.00 plus Sheriff's fees was subsequently signed by Judge Juidice of the County Court of Dutchess County on August 30, 1974, a copy of which is attached hereto and made a part hereof. The order was duly served on Joanne Harvard on September 5, 1974 as is shown by the affidavit of service, a copy of which is attached hereto. She made no payments as required by the said order, see the affidavit of Noncompliance attached hereto and made a part hereof; and therefore a Commitment Order was obtained from the said County Court and

signed by Judge Juidice on September 23, 1974, a copy of which is attached hereto and made a part hereof: The Commitment Order was transmitted to the Sheriff of Dutchess County, who pursuant thereto, arrested Joanne Harvard on November 21, 1974. Her mother, on her behalf, paid the sum of $294.25 including Sheriff's fees, that date, and Joanne Harvard was released from custody. Attached hereto and made a part hereof is the affidavit of the Sheriff of Dutchess County attesting to his execution of the Commitment Order.

6. By her affidavit, Joanne Harvard does not question the validity of the default judgment taken against her. By paragraphs 5 through 13, in her affidavit, she admits that she failed to appear for the information subpoena, the hearing of the order to show cause, and further that she failed to obey the fine order. As has previously (Illegible)

7. The Commitment Order was issued ex parte only after said Joanne Harvard ignored the prior proceedings though duly served with notice. Prior to the issuance of the Commitment Order, the proposed plaintiff herein had every opportunity to answer the charge of contempt and to challenge the amount of the fine imposed by the County Court, contrary to the allegations made in paragraph 17 of the proposed plaintiff's affidavit.

8. The proposed plaintiff, subsequent to her lawful imprisonment, has made voluntary payments of only $25.00 on the obligation arising from the original judgment taken against her for $413.40.

9. With reference to paragraph 22 of the moving affidavit, a letter dated December 20, 1974, was sent to Joanne Harvard in which it was stated that further legal action

would be taken if she did not make her weekly payments. There was no threat express or implied in the letter that Joanne Harvard would be imprisoned.

10. On November 22, 1974, Maggie Ruth Harvard, mother of the proposed plaintiff, visited the law office of Gilday and Morrow and left $10.00 with an individual in the office to be applied to the debt of the proposed plaintiff in the event she defaulted in the future on her payments. Mrs. Harvard asked to be notified by telephone on the occasions when her daughter defaulted so that she could make the payments for her daughter. This arrangement was made at her request.

11. On or about January 6, 1975, a phone conversation was had between Maggie Ruth Harvard, and an individual of this office in which Ms. Harvard terminated her arrangement to make payments for her daughter. Contrary to the allegation made in paragraph 23 of the moving affidavit, at no time was Ms. Harvard told that her daughter would be imprisoned again if she did not make the weekly payment.

12. With reference to paragraph 24 of the moving affidavit, your deponent did not state to said Joanne Harvard in any conversation that he had no other alternative but to imprison her again if she did not make the payments. No such threat was ever made to my knowledge by any individual in this office, including myself.

13. The allegations made in paragraph 25 of the moving affidavit that said Joanne Harvard is in danger of repeated incarceration is without merit since at this time there are no contempt proceedings pending against her. Further, the ground listed by the proposed plaintiff for the motion that she is in dire need of immediate relief

since she has been threatened with imprisonment within the immediate future by the defendants, is groundless and without foundation in fact.

14. Since there are no legal proceedings pending in which a fine could be imposed upon the proposed intervenor or in which she could be imprisoned, the relief requested in paragraph (c) of the order to show cause for a preliminary injunction enjoining the defendants named therein from imposing a fine and/or imprisoning her, should be denied in total for mootness.

15. Your deponent on behalf of Domestic Finance denies the legal conclusions drawn by said Joanne Harvard in paragraphs of her affidavit designated 15, 16, 17, 18, 19. She was neither wrongfully imprisoned nor wrongfully deprived of the $294.25 in violation of the U.S. Constitution.

16. Based upon the foregoing her request in her affidavit for judgment in the amount of $100.00 for her unlawful imprisonment must be denied.

17. Based upon the foregoing, her request for judgment in the amount of $294.25 against defendant Domestic Finance for the imposition of the aforesaid fine must be denied.

18. That Joanne Harvard has voluntarily paid $25.00 on the default judgment hereinbefore mentioned in the amount of $413.40 recovered against her in favor of Domestic Finance.

19. That said Joanne Harvard has failed to pay the amount of $388.40, though duly demanded, and continues to owe that amount plus interest.

20. By virtue of the foregoing said Domestic Finance has been damaged in the amount of $388.40.

21. Your deponent on behalf of Domestic Finance prays that this court:

(1) Deny to said Joanne Harvard her request for a preliminary injunction made in paragraph (c) of the order to show cause;

(2) Deny her demand for judgment in the amount of $100.00 for unlawful imprisonment;

(3) Deny her demand for judgment in the amount of $294.25 for the fine imposed upon her;

(4) Enter judgment against said Joanne Harvard in favor of Domestic Finance in the amount of $388.40, and/or that it have judgment against any recovery in favor of said Joanne Harvard, to the extent of the amount of $388.40, the amount of the counterclaim herein.

s/ CHARLES P. MORROW
Charles P. Morrow

(Jurat)

Exhibit—Return on Commitment Order.

STATE OF NEW YORK
COUNTY OF DUTCHESS } ss.:

#15645

Domestic Finance

Plaintiff

vs:

JOANN HARVARD

Defendant

I, LAWRENCE M. QUINLAN, Sheriff of Dutchess County, New York, do hereby certify and return that on the 26th. day of September, 1974, the Commitment Order in the above entitled action was received at the Dutchess County Sheriff's Office, Poughkeepsie, New York.

I further certify and return that on the 21st. day of November, 1974 at 78 Academy Street, City of Poughkeepsie, Dutchess County, New York, under and by virtue of the Commitment Order received by me on the 26th. day of September, 1974 in the above entitled action I arrested the said defendant JOANN HARVARD, and at the same time and place delivered to her a copy of the Commitment Order upon which the same was granted to her.

I further certify and return that on the 21st. day of November, 1974, the said defendant paid to Lawrence M. Quinlan, Sheriff of Dutchess County, New York, the full amount of the Commitment Order of $294.25. Thereupon the said defendant was discharged from arrest by Lawrence M. Quinlan, Sheriff of Dutchess County, New York.

LAWRENCE M. QUINLAN

Exhibit—Commitment Order.

LAWRENCE M. QUINLAN
SHERIFF, DUTCHESS COUNTY

Sworn to before me this
26th day of November, 1974.

JESSIE J. PONTE
Notary Public, Dutchess County

JESSIE J. PONTE
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1975

Exhibit—Commitment Order.

At a Special Term, Part COUNTY COURT of the STATE OF NEW YORK County of DUTCHESS, held at the Courthouse, No. POUGHKEEPSIE, NEW YORK on the 23rd day of September, 1974.

Index No. 74/2182
15645

Present Hon. JOSEPH JIUDICE, Justice

DOMESTIC FINANCE

Plaintiff(s)

against

JOANN HARVARD

Defendant(s)

Exhibit—Commitment Order.

On reading the—subpoena—dated May 1st 1974 which directed JOANN HARVARD to APPEAR AND ANSWER FOR EXAMINATION AND SUPPLEMENTARY PROCEEDINGS. the affidavit of VIRGINIA TRAVER verified May 1st 1974 showing due service thereof. the order to show cause why JOANN HARVARD should not be punished for contempt of court, dated JULY 22nd 1974, the affirmation of CHARLES P. MORROW, ESQ. dated JULY 19th 1974 in support of said order; the affidavit of VIRGINIA TRAVER dated JULY 29th 1974 showing due service of a certified copy of said order to show cause,

AND on reading and filing the order entered herein on AUGUST 30th 1974 fining the said the sum of $270 and directing the payment of said fine in instalments of $10 each commencing on SEPTEMBER 9th 1974 and on reading and filing the affidavit of GEORGE TRAVER verified 9/5/74 showing the service of a certified copy of said order with notice of entry thereof on said JOANN HARVARD and the AFFIDAVIT OF NON COMPLIANCE dated SEPTEMBER 16th 1974 showing that said order has not been complied with.

NOW, ON MOTION OF GILDAY & MORROW, ESQS. attorney(s) for DOMESTIC FINANCE judgment creditor, it is

ORDERED, that the motion to punish said JOANN HARVARD for contempt is granted; and it is

ADJUDGED, that he is guilty of contempt of Court in having willfully disobeyed said order—AUGUST 30th 1974 in that he failed to comply pursuant thereto, and that he has failed to satisfactorily excuse or explain said contempt; it is

ADJUDGED, that his misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor herein; it is

Exhibit—Commitment Order.

ADJUDGED, that he has failed to purge himself of said contempt and has failed to pay the fine imposed by said order entered on AUGUST 30th 1974 herein imposed on him for his said contempt, to wit, the total sum of $270; it is therefore

ORDERED, that without further notice to said JOANN HARVARD—the Sheriff of any County within the State of New York—wherein he may be apprehended shall forthwith arrest him without further process, and commit him to the County Jail of said County and hold him in close custody until he shall have paid said fine of $270 together with said Sheriff's fees and the disbursements on the execution of this order, or is discharged according to law.

ENTER

JOSEPH JUIDICE
Justice of the County Court

CERTIFICATION

The undersigned attorney certifies that the within order has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

.....

The name signed must be printed beneath

Attorney(s) for Judgment Creditor

Exhibit—Commitment Order.

Index No.

COUNTY COURT
COUNTY OF DUTCHESS

DOMESTIC FINANCE

PLAINTIFF

against

JOANN HARVARD

DEFENDANT

COMMITMENT ORDER

GILDAY & MORROW, ESQS.
Attorney(s) for Judgment Creditor
Office and Post Office Address
40 Cannon Street
Poughkeepsie, New York
(914) 454-6480

DUTCHESS COUNTY
SHERIFF

SEP 26 3 51 PM '74

Amount	250.00
Cost	20.00
Service Fees	7.50
Mileage Fees	1.00
Poundage	13.50
Affidavit	.25
Total	...
Service Fees	...
Mileage Fees	...
State Fees	...
Mun. Fees	...
Previous Fees	...
C&D	2.00
Total	294.25

Exhibit—Affidavit of Non-compliance.

COUNTY COURT : STATE OF NEW YORK
COUNTY OF DUTCHESS
INDEX NO. 74/2182

DOMESTIC FINANCE,

Plaintiff,

against

JOANN HARVARD,

Defendant.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

CHARLES P. MORROW, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff herein and makes this affidavit in support of a commitment order against the defendant.

That on the 5th day of September, 1974, an order was issued fining the defendant herein. That the said order provided that payments were to commence on the 9th day of September, 1974, and continuing each week thereafter until said total fine is paid.

That said order was duly served as appears in the affidavit of GEORGE TRAVER attached hereto and made a part hereof, and that the said defendant has not complied with said order by making any payments whatsoever.

WHEREFORE, it is respectfully prayed that the commitment issue.

CHARLES P. MORROW
CHARLES P. MORROW, Esq.

(Jurat)

Exhibit—Affidavit of Service of Imposing Fine Order.

COUNTY COURT
COUNTY OF DUTCHESS

DOMESTIC FINANCE

Plaintiff(s)

against

JOANN HARVARD

Defendant(s)

STATE OF NEW YORK, COUNTY OF DUTCHESS *ss.:*

GEORGE TRAVER being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides at Poughkeepsie, N.Y. That on Sept. 5, 1974 at No. 78 Academy St., Poughkeepsie, N.Y., 10:45 AM

CHECK APPLICABLE BOX AND FILL IN FORM

INDIVIDUAL 1. ☒ deponent served the within subpoena on Joann Harvard the witness therein named, by delivering a true copy thereof to witness personally and at the same time paying (or tendering) in advance $, the authorized travelling expenses and one day's witness fee: deponent knew the person so served to be the witness described in said subpoena.

CORPORATION 2. ☐ deponent served the within subpoena on a corporation, the witness therein named, by delivering a true copy thereof to

Exhibit—Affidavit of Service of Imposing Fine Order.

personally, whom deponent knew to be the of said corporation, and at the same time paying (or tendering) in advance $, the authorized traveling expenses and one day's witness fee: deponent knew the corporation so served to be said corporate witness.

ALTERNATIVE METHOD 3. ☐ witness' actual place of business—dwelling place—usual place of abode, deponent served the within subpoena upon the witness
strike out either (a) or) (b)
(a) by delivering thereat, a true copy thereof to
a person of suitable age and discretion
(b) by affixing a true copy thereof to the door thereof, deponent was unable, with due diligence to find witness or a person of suitable age and discretion thereat, having called there

A.M.
on ..... 19.... at ....P.M.
A.M.
on ..... 19.... at ....P.M.
A.M.
on ..... 19.... at ....P.M.
A.M.
on ..... 19.... at ....P.M.

deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to said witness at witness' last known residence, No.

and deposited said wrapper

Exhibit—Affidavit of Service of Imposing Fine Order.

in—a post office—official depository under the exclusive care and custody of the United States Postal Service within New York State.

DESCRIPTION USE WITH 1 *or* 3a ☒

Deponent describes the individual served as follows:

- ☐ Male
- ☒ Female
- ☐ White Skin
- ☒ Black Skin
- ☐ Yellow Skin
- ☐ Brown Skin
- ☐ Red Skin
- ☒ Black Hair
- ☐ Brown Hair
- ☐ Blond Hair
- ☐ Gray Hair
- ☐ Red Hair
- ☐ White Hair
- ☐ Balding
- ☐ 14-20 Yrs.
- ☒ 21-35 Yrs.
- ☐ 36-50 Yrs.
- ☐ 51-65 Yrs.
- ☐ Over 65 Yrs.
- ☐ Under 5′
- ☒ 5′0″-5′3″
- ☐ 5′4″-5′8″
- ☐ 5′9″-6′0″
- ☐ Over 6′
- ☐ Under 100 Lbs.
- ☒ 100-130 Lbs.
- ☐ 131-160 Lbs.
- ☐ 161-200 Lbs.

Exhibit—Order Imposing Fine.

☐ Over 200 Lbs.

Other identifying features:

Sworn to before me on 9-5-74
(ILLEGIBLE)

GEORGE TRAVER
Print name beneath signature
GEORGE TRAVER

(Jurat)

Exhibit—Order Imposing Fine.

At a Special Term Part of the COUNTY Court of the STATE OF NEW YORK held in and for the County of DUTCHESS at the Court House thereof in the on the 30th day of August, 1974.

Present: HON. JIUDICE, Justice.

DOMESTIC FINANCE,

Plaintiff,

against

FRANKLIN GREEN AND JOANN HARVARD,

Defendant.

On reading the—subpoena—order—restraining notice—dated May 1st 1974 which directed JOANN HARVARD to ap-

Exhibit—Order Imposing Fine.

pear and answer questions in Subpoena, the affidavit VIRGINIA TRAVER verified the 1st day of May, 1974 showing due service thereof.

the order to show cause why JOANN HARVARD should not be punished for contempt of court, dated the 22nd day of July 1974, the affirmation in support of said order; the affidavit of VIRGINIA TRAVER dated the 29th day of July 1974

NOW ON MOTION of the attorney(s) for the judgment creditor, it is

ORDERED that this motion to punish for contempt is granted and JOANN HARVARD is adjudged guilty of contempt of court in having wilfully disobeyed said—subpoena—order—restraining notice—in that she failed to comply herewith and failed to satisfactorily excuse or explain said contempt; and it is

ADJUDGED that said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor; and it is

ORDERED that JOANN HARVARD be and hereby is fined for said contempt the sum of $250 together with $20 costs of these proceedings making a total of $270 to be paid to the judgment creditor at the office of the attorney(s) for the judgment creditor at 40 Cannon Street, Poughkeepsie, New York in installments of $10 commencing on week received this order 19 and continuing on each week thereafter until said total fine is paid and when paid, $270 thereof shall be applied toward the satisfaction of the judgment herein, and it is

Exhibit—Order Imposing Fine.

ORDERED that a copy of this order be served upon JOANN HARVARD personally, and it is

ORDERED that upon failure to pay said fine as aforesaid, the entire amount imposed shall immediately fall due and a commitment order issue without further notice to the said person directed to the City Sheriff of the City of New York or to the Sheriff of any county within the State of New York wherein said person may be apprehended, commanding him forthwith to arrest said person without further process, and commit her to the county jail of said county and hold her in close custody until she shall pay said fine or is discharged according to law.

ENTER

s/ JOSEPH JIUDICE
Justice of the County Court*

CERTIFICATION

The undersigned attorney certifies that the within order has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

CHARLES P. MORROW
The name signed must be printed beneath

Attorney(s) for Judgment Creditor

---

* On margin of order: "DEFAULT IN COMPLIANCE WITH THE PROVISIONS OF THIS ORDER MAY SUBJECT PARTY NAMED TO IMPRISONMENT".

Exhibit—Order Imposing Fine.

GILDAY & MORROW
Counsellors at Law
40 Cannon Street
Poughkeepsie, N. Y. 12601

STATE OF NEW YORK

COUNTY COURT : DUTCHESS COUNTY

INDEX NUMBER 1974/2182

DOMESTIC FINANCE, Plaintiff

against

JOANN HARVARD, Defendant

MOTION TO OBTAIN ORDER TO SHOW CAUSE

GRANTED NO OPPOSITION

SUBMIT ORDER

DATE AUGUST 27, 1974

HON. JOSEPH JIUDICE
Dutchess County Judge

CC: GILDAY & MORROW, ESQ.
40 Cannon Street
Poughkeepsie, New York

JOANN HARVARD
78 Academy Street
Poughkeepsie, New York
SUBMITTED TO COUNTY
CLERK FOR FILING
Date 8-28-74

Opinion and Order Convening Three-Judge Court, 387 F.Supp. 630.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

Mid-Hudson Valley Legal Services Project (Monroe County Legal Assistance Corp.), Poughkeepsie, New York and Greater Up-State Law Project, Rochester, New York (John D. Gorman, Jane E. Bloom, K. Wade Eaton and Rene H. Reixach, Jr., of counsel), for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York, New York, New York (A. Seth Greenwald, Asst. Attorney General, of counsel), for Defendants Juidice and Aldrich and Pro Se pursuant to New York Executive Law § 71.

CANNELLA, D.J.:

This civil rights action, which is brought pursuant to 42 U.S.C. § 1983, asks that the Court declare unconstitutional and enjoin the enforcement of a panoply of sections contained in Article 19 of the New York Judiciary Law (New York Judiciary Law §§ 756, 757, 765, 767, 769, 770-75) as being in derogation of the due process and equal protection clauses of the Fourteenth Amendment. It is presently before the Court on plaintiff's motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 and upon the defendant's cross-motion to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R. Civ.P. 12(b)(6), upon a predicate finding by the Court that no substantial constitutional issue is

raised. As the Court is of the view that the plaintiffs have satisfied the prerequisites for convening a three-judge court, their motion is hereby granted and, of course, the defendants' cross-motion is hereby denied.

The contours of the statutory scheme here at issue were recently well stated by one commentator. Alderman, *Imprisonment for Debt: Default Judgments, The Contempt Power & The Effectiveness of Notice Provisions in the State of New York,* 24 Syracuse L. Rev. 1217, 1222-24 (1973).

> A money judgment is a special kind of debt which affords the judgment creditor remedies not available to other creditors. However, even money judgments do not collect themselves. In order to enforce his judgment the creditor either must locate and attach the debtor's assets, or, assuming no attachable assets, compel payment from the debtor himself.
>
> In order to assist the judgment creditor in his search for assets, New York allows the judgment creditor to compel the judgment debtor to disclose the nature, value and location of all his assets. Section 5223 of the New York Civil Practice Law & Rules (CPLR) provides that: "At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment." Section 5223 further provides that the disclosure shall be effectuated "by serving upon any person a subpoena . . . . [F]ailure to comply with the subpoena is punishable as a contempt of court."
>
> Although three types of subpoenas are statutorily authorized, the most commonly used forms are (1) the subpoena requiring attendance of the debtor for the taking of a deposition, and (12) the information

> subpoena, which is accompanied by written questions to be answered and returned by the debtor. Upon service of either of these subpoenas the judgment debtor must, under penalty of contempt, comply with its directions. Assuming proper service by the judgment creditor and compliance by the judgment debtor, assets will be disclosed and the judgment satisfied. Alternatively, a disclosure of no attachable assets will temporarily appease the judgment creditor or force him to look elsewhere to satisfy the judgment. In the event that the judgment debtor fails to comply with the judgment creditor's subpoena, however, the CPLR provides that the debtor may be found in contempt and punished accordingly. The procedures that the judgment creditor must follow to have the recalcitrant debtor held in contempt are found in the judiciary law. [The statutes here challenged.] While the court has the power to punish the judgment debtor summarily, the practice generally followed in the case of nondisclosure is the issuance of a show cause order and a subsequent hearing to determine the guilt or innocence of the alleged contemnor.
>
> In the event that the judgment debtor fails to appear at the show cause hearing he will be adjudged in contempt in absentia, the burden of proof having shifted to the debtor to show cause why he should not be held in contempt. After return of the show cause order and a determination that the judgment debtor is in contempt, the debtor may be fined an amount sufficient to indemnify the aggrieved creditor, or to pay him an amount not exceeding costs plus $250. Immediately thereafter a commitment order will issue, directing that the judgment debtor stand committed to the local jail until such time as the fine is paid. The judgment debtor may then remain incarcerated,

> without the assignment of counsel or judicial review, for up to 90 days. The fine, when paid, is remitted directly by the court to the judgment creditor and is applied to the debt. [Footnotes omitted.][1]

As regards the precise factual allegations giving rise to the instant controversy the Court can be brief, as the facts advanced are squarely within the pattern of statutory enforcement suggested by Alderman, *supra*. Each plaintiff (as well as the proposed plaintiff-intervenor) is a judgment debtor who has failed to respond to or comply with a post-judgment discovery subpoena. Each has been served with an order to show cause requiring that he demonstrate why he should not be adjudged in contempt of court for failure to obey such subpoena and each has failed to appear at the show cause hearing. Accordingly, each was adjudged in contempt of court and, upon failure to pay the fine specified by the County Court in its contempt order, has been incarcerated or subjected to an immediate threat of incarceration pursuant to an *ex parte* commitment order issued in compliance with § 756 of the Judiciary Law.

With this statutory and factual framework in mind, we turn to consider plaintiffs' motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. As Judge Lasker has recently stated,

> [t]he motion should be granted if the complaint at least formally alleges a basis for equitable relief and raises a substantial constitutional question (Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L. Ed. 2d 794 (1962)), if it attacks a state statute's general application and names a state officer as a defendant (Ince v. Rockefeller, 290 F. Supp. 878, 881 (S.D.N.Y. 1968)).[1A]

Sugar v. *Curtis Circulation Co.*, 377 F.Supp. 1055, 1061

(S.D.N.Y. 1974). *See also, Nieves* v. *Oswald*, 477 F.2d 1109, 1111-12 (2 Cir. 1973); 227 *Book Center, Inc.* v. *Codd*, 381 F.Supp. 1111, 1113 (S.D.N.Y. 1974); *Johnson* v. *Rockefeller*, 58 FRD 42, 48 (S.D.N.Y. 1973). The only prerequisite to the convening of a three-judge court which the Attorney General alleges has not been met by plaintiffs, is whether this case gives rise to a substantial constitutional question.[2] We now turn to consider such issue.

A determination of substantiality in the present context "hangs on whether or not the constitutional issue presented is foreclosed by decisions of the Supreme Court which are analogous to the case at hand" and, as such, "[t]he 'foreclosure' hurdle is not a high one." *Sugar* v. *Curtis Circulation Co.*, 377 F.Supp. at 1061. The doctrine of "substantiality" was recently reviewed by the Supreme Court in *Hagans* v. *Lavine*, 415 U.S. 528, 536-38 (1974) (in which the Court quoted extensively from its earlier opinion in *Goosby* v. *Osser*, 409 U.S. 512 (1973)):

> Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579 (1904); "wholly insubstantial," *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962); "obviously frivolous," *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285, 288 (1910); "plainly unsubstantial," *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933); or "no longer open to discussion," *McGilvra* v. *Ross*, 215 U.S. 70, 80 (1909). One of the principal decisions on the subject, *Ex parte Poresky*, 290 U.S. 30, 31-32 (1933), held, first, that "[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented"; second, that a three-judge court was not necessary to pass

upon this initial question of jurisdiction; and third, that "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Levering & Garrigues Co.* v. *Morrin, supra; Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288; *McGilvra* v. *Ross,* 215 U.S. 70, 80."

Only recently this Court again reviewed this general question where it arose in the context of convening a three-judge court under 28 U.S.C. § 2281:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey* v. *Patterson,* 369 U.S., at 33; 'wholly insubstantial,' *ibid.;* 'obviously frivolous,' *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910); and 'obviously without merit,' *Ex parte Poresky,* 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if '"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy"' (Citations omitted)." *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973).

See also, Glover v. *East Harlem Block Nursery, Inc.,* —— F.2d ——, Nos. 73-1876, 73-1904 and 73-1906 (2 Cir. Nov. 1, 1974) (slip op. at 203-04); *Rosenthal* v. *Bd. of Educ.,* 497 F.2d 726, 729-30 (2 Cir. 1974). In light of this standard, which, as Judge Lasker has noted, "is not a high one," the defendants' assertion that the present complaint does not give rise to substantial constitutional questions is perceived by this Court as wholly spurious. Be that as it may, we briefly address such challenge.

As was noted above, plaintiffs seek a declaration that §§ 756, 757, 765, 767 and 769-75 of the New York Judiciary Law are unconstitutional in that they contravene the Fourteenth Amendment's guarantee of due process and equal protection of the laws. In support of their position, plaintiffs have advanced numerous challenges to the statutory scheme. In particular, they allege that the statutory scheme embraced in the challenged sections is unconstitutional because: (1) these statutes provide for notice which is insufficient to apprise debtors of the possible ramifications of their failure to appear at a show cause hearing; (2) due process requires that counsel be appointed for indigent debtors prior to their commitment for contempt; (3) due process requires that debtors be afforded notice and a hearing prior to the issuance of a warrant of commitment and that they be afforded a right to an allocution by the court prior to confinement; (4) due process bars the imposition of a fine for civil contempt which is neither coercive nor compensatory; and (5) the imprisonment of indigent debtors for failure to pay a civil contempt fine deprives such persons of equal protection of the laws.

While it is not the proper function of this Court to determine now which, if any, of these allegations might be possessed of merit in the ultimate, none of these claims can be viewed as insubstantial in a constitutional sense. This Court has found no case in the Supreme Court,[3] or elsewhere, which either directly or by analogy unfavorably

disposes of the contentions advanced by the plaintiffs. Indeed, cases relied upon by the Attorney General to support his position, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970); and *Desmond* v. *Hachey*, 315 F.Supp. 328 (D.Me. 1970), to the extent that they are relevant, can only be said to support the plaintiffs' claims. Rather than being "so attenuated and unsubstantial as to be devoid of merit," "no longer open to discussion," "wholly insubstantial," "obviously frivolous," "plainly unsubstantial," or foreclosed by earlier decisions, the issues raised by the instant case are perceived by this Court as giving rise to real, viable and substantial constitutional controversies, the resolution of which are far from settled and are clearly not free of doubt or rendered frivolous by the prior decisions of the Supreme Court. We are presented with issues which are wholly appropriate subjects for adjudication by a three-judge court.[4]

The substantiality of the issues raised herein is manifested by reference to numerous decisions of the Supreme Court,[5] as well as to the several lower federal court and state court opinions which have addressed questions of like or analogous nature. *See, e.g., Non-Resident Taxpayers Association* v. *Murray*, 347 F.Supp. 399 (E.D.Pa. 1972) (three-judge court), *aff'd mem.*, 410 U.S. 919 (1973) challenge to Pennsylvania statute governing issuance of a writ of *capias ad respondendum*); *Desmond* v. *Hachey*, 315 F.Supp. 328 (D.Me. 1970) (declaring unconstitutional a Maine law which permitted the arrest and incarceration, without hearing, of a judgment debtor who had failed to obey a disclosure subpoena); *Otton* v. *Zaborac*, 525 P.2d 537 (Alaska Sup.Ct. 1974) (right of indigent faced with adjudication of civil contempt in non-support context to appointed counsel); *Sodones* v. *Sodones*, 314 N.E.2d 906 (Mass.Sup.Jud. Ct. 1974) (due process in civil contempt

context); *Yoder* v. *County of Cumberland*, 278 A.2d 379 (Me.Sup.Ct. 1971) (summary incarceration of debtor without hearing held unconstitutional); *Perlmutter* v. *DeRowe*, 274 A.2d 283 (N.J.Sup.Ct. 1971) (New Jersey *ca. re.* practice read to require that debtor be brought before a judge immediately upon his arrest based upon an *ex parte* writ); *In re Harris*, 69 Cal.2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) (California "mesne process of civil arrest without opportunity to be heard with the assistance of counsel is not due process." 446 P.2d at 152.); *but see, Carter* v. *Lynch*, 429 F.2d 154 (4 Cir. 1970) (a pre-*Fuentes* decision). *See also*, Alderman, *supra*, 24 Syracuse L. Rev. at 1239-1247; Countryman, *The Bill of Rights and the Bill Collector*, 15 Ariz. L. Rev. 521, 567-72 (1973); Comment, *Imprisonment for Debt and the Constitution*, 1970 L. & Soc. Order 659 (1970).

If any qualms concerning the substantiality of the constitutional issues presented in this litigation remain with the reader after careful consideration of the above noted authorities, surely the following passage from the Court's opinion in *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972) (whatever its vitality in light of *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974)) places them at rest.

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the state must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o

> better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss of notice of the case against him and opportunity to meet it." (Citation omitted).

If such procedural rights must be accorded to one who is subject to a deprivation of property rights, then, clearly, substantial constitutional issues are presented with regard to one who is subject to incarceration as a result of the statutory scheme embraced in Article 19 of the New York Judiciary Law. *See also, Desmond* v. *Hachey, supra,* 315 F.Supp. at 333.

Having thus concluded that plaintiffs have raised substantial constitutional questions and have otherwise met the prerequisites of the three-judge court statute, 28 U.S.C. §§ 2281, 2284, only one further point raised by the Attorney General detains us from notifying Chief Judge Kaufman of the pendency of this cause, and then, only briefly. In his Brief (at 6-7) the Attorney General states: "Assuming *arguendo,* that the state court proceedings are 'criminal' and plaintiffs are entitled to the asserted rights, there are pending state court proceedings (supplementary to judgment) which, if plaintiffs only would appear—even once—, their rights, whatever they may be, could be vindicated. In the meanwhile, principles of equity, comity and federalism should prevail. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971); as the civil matters, *Gibson* v. *Berryhill,* 411 U.S. 564 (1973)." However, the sections and procedures subject to attack in this lawsuit, are not "criminal" in nature, but rather, are "civil" and result in the imposition of civil contempt sanctions and this has been long recognized by the courts of the State of New York. *See, e.g., King* v. *Barnes,* 113 N.Y. 476 (1889); *Feinberg* v. *Kutcosky,* 147 App. Div. 393, 132 N.Y.S. 9 (3rd Dept. 1911) ("Failure to originally appear for examination in pursuance of an order in supplementary proceedings, or upon an adjourned day is a civil contempt, and not a criminal one . . ." 132 N.Y.S. at 10); *Samuels* v. *Ganz,* 174 Misc. 399, 21 N.Y.S.2d 268 (Sup. Ct. 1940). (Indeed § 753 is entitled "Power of courts to punish for civil contempts.") As Judge Smith has recently noted, the strict rule of *Younger* and its progeny has no place in these circumstances.

> It must be remembered, however, that the Supreme Court has thus far refused to extend *Younger* to cases involving state civil proceedings. *See,* Gibson v. Berryhill, 411 U.S. 564, 573-576, 93 S.Ct. 1689, 36 L. Ed. 2d 488 (1973); California v. LaRue, 409 U.S. 109, 124 n.2, 93 S.Ct. 390, 34 L. Ed. 2d 342 (1972) (Marshall, J., dissenting); Mitchum v. Foster, 407 U.S. 225, 244, 92 S.Ct. 2151, 32 L. Ed. 2d 705 (1972) (Burger, C.J., concurring); Younger v. Harris, 401 U.S. 37, 55, 91 S.Ct. 746, 27 L. Ed. 2d 669 (1971) (Stewart, J., concurring).
>
> We are, therefore, unwilling to endorse the district court's view . . . that a support action is so "quasi-criminal" as to bring it within the strict ambit of *Younger.*[5] . . . [W]e do believe that the particularly stringent formulation of . . . *Younger* should be limited, at least until the Court instructs otherwise, to cases involving traditionally criminal proceedings.

Blouin v. *Dembitz,* 489 F.2d 488, 490-91 (2 Cir. 1973). *See also, Polk* v. *State Bar of Texas,* 480 F.2d 998, 1002 (5 Cir. 1973), *quoting from, Palaio* v. *McAuliffe,* 466 F.2d 1230 (5 Cir. 1972) ("the principles of *Younger* bar federal

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[5] As the district court noted, the state's characterization of the proceedings will at least partially determine *Younger's* applicability. (Citations omitted). Here it is clear that contemporary New York law views the support proceedings at issue as "civil." (Citations omitted).

intervention in a state civil proceeding that is an integral part of state's enforcement of its criminal laws."). *Cf., Allee* v. *Medrano,* 416 U.S. 802 (1974); *Steffel* v. *Thompson,* 415 U.S. 452 (1974).

This Court is of the view that while plaintiffs seek to imbue civil contempt proceedings involving judgment debtors with certain of the elements usually associated with the criminal law, such proceedings as are now ongoing in the state courts do not, for that reason, become "criminal" in nature and, as such, an assumption *arguendo* to the contrary and dismissal under the doctrine of *Younger* and its progeny is not warranted.[4]

For all of the reasons aforestated, plaintiffs' motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 is hereby granted and this Court will so advise Chief Judge Kaufman. The defendants' motion to dismiss is hereby denied.

It is So Ordered.

John M. Cannella
United States District Judge

Dated: New York, N. Y., January 13, 1975.

FOOTNOTES

[1] *See,* in addition to the Judiciary Law sections here in suit, NYCPLR 5223 and 5251; 6 J. Weinstein, H. Korn and A. Miller, *New York Civil Practice* ¶ 5251.01 *et seq.* (1973); 10 Carmody Wait 2d § 64:376 (1966) and 22 Carmody Wait 2d § 140:38 *et seq.* (particularly §§ 140:133-140:137).

[1A] Even more recently, the Supreme Court has restated "the several conditions precedent to convening a three-judge court under 28 U.S.C. §§ 2281 and 2284" as being:

> the constitutional question raised [is] substantial; the action [seeks] to enjoin a state official from executing statutes of statewide application; and the complaint at least formally allege[s] a basis for equitable relief.

Gonzalez v. Automatic Employees Credit Union, —— U.S. ——, 43 U.S.L.W. 4025, 4026 (Dec. 10, 1974).

[2] It is plain from reading the complaint, as well as from what is said above, that a basis for equitable relief has been formally alleged by plaintiffs and that this action attacks a state statute's general application. Additionally, while defendant Quinlan, the Sheriff of Dutchess County and defendants Juidice and Aldrich, Judges of the Dutchess County Court, are "local officers" under the provisions of § 2 of the New York Public Officers Law, it has long been recognized that they are "state officers" for purposes of the instant standard. Spielman Motor Co. v. Dodge, 295 U.S. 89, 92-95 (1935). *See also,* Board of Regents v. New Left Education Project, 404 U.S. 541, 544 n. 2 (1972).

[3] *Cf.,* Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). In *Endicott Johnson,* at 288-90, it was held that the opportunity of a defendant to appear and to contest the entry of a judgment which adjudicated his civil obligation to pay money was sufficient to render unnecessary further notice or hearing before the judgment creditor might resort to a form of execution by which property of the debtor would be summarily applied in satisfaction of the judgment. While the continued vitality of *Endicott Johnson* is doubtful, *see* Hanner v. DeMarcus, 390 U.S. 736 (1968) (Douglas, J. dissenting from dismissal of writ of certiorari as improvidently granted), its holding is plainly distinguishable from the matter at bar. This is because the civil contempt provisions here at issue concern themselves with proceedings supplementary to the entry of judgment and involve a new and separate adjudication arising not from the debt but rather, from a failure to obey the disclosure subpoena. Here, the determination goes to an individual's liberty, not merely his property, and,

for that reason alone, ***Endicott Johnson*** can not control. ***See,*** Desmond v. Hachey, 315 F.Supp. at 332; Yoder v. County of Cumberland, 278 A.2d 379, 387 and n. 5 (Me.Sup.Ct. 1971).

[4] This is not to say that the three-judge panel might not ultimately decide to invoke one of the abstention doctrines in the present case. However, such decision is for the panel, and not for this Court, as a single judge, to make. ***See,*** discussion at n. 6 *infra.*

[5] While the citation of Supreme Court decisions which might arguably support the claims raised in this suit (in addition to those already cited) would expand over several pages, the following representative cases may assist the reader in focusing upon the issues presented. ***See, e.g.,*** Wolff v. McDonnell, —— U.S. ——, 42 U.S.L.W. 5190 (June 26, 1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Argersinger v. Hamlin, 407 U.S. 25 (1972); Groppi v. Leslie, 404 U.S. 496 (1972); Goldberg v. Kelley, 397 U.S. 254 (1970); In re Gault, 387 U.S. 1 (1967); Shillitani v. United States, 384 U.S. 364 (1966); In re Oliver, 333 U.S. 257 (1948).

[6] This is not to suggest that the principles enunciated in *Younger* and its progeny, together with other abstention doctrines, may not be invoked by the panel in the exercise of its discretion. Rather, we conclude only that the doctrine of absolute bar to federal court adjudication in instances where state criminal proceedings are presently pending (absent exceptional circumstances) contained in *Younger* and the subsequent decisions does not foreclose our consideration of the instant case. As the Supreme Court recently stated:

> A three-judge court . . . is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of discretion will usually be necessary, see ***Jones*** v. ***Wade,*** 479 F.2d 1176, 1180 (CA 5 1973); ***Abele*** v. ***Markle,*** 452 F.2d 1121, 1125 (CA 2 1971); see generally Note, The Three-Judge District Court: Scope and Procedure under Section 2281, 77 Harv. L. Rev. 299, 309 (1963).

Steffel v. Thompson, 415 U.S. at 457 n. 7. This statement of the Court is in full accord with the earlier decisions in this Circuit and District. New York State Waterways Assn., Inc. v. Diamond, 469 F.2d 419, 423 (2 Cir. 1972) ("The decision to abstain is for the three-judge court, not for the single judge."); Abele v. Markle, 452 F.2d 1121, 1125 (2 Cir. 1971); Snead v. Dept. of Social Services, 351 F.Supp. 1360, 1366 (S.D.N.Y. 1972); Johnson v. Rockfeller, 58 F.R.D. at 48. To the extent that

Judge Newman's recent decision in Cooper v. Meskill, 376 F.Supp. 731 (D.Conn. 1974) is to the contrary, we decline to follow it as we find that it does not give proper recognition to the views expressed by the Court in *Steffel, supra.* As the Fifth Circuit well stated in Jones v. Wade, 479 F.2d 1176, 1180 (5 Cir. 1973):

> In a case otherwise within the jurisdiction of a three-judge court, the question whether the Younger doctrine requires abstention is generally a matter for the exercise of equitable discretion, and thus ordinarily a determination to be made by a three-judge court rather than by a single judge. (Citations omitted). A single district judge may dismiss only where it is plain that *Younger* leaves no room for a three-judge court to exercise equitable discretion.

Notice of Motion to Amend Affidavits.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the above-named defendants:

PLEASE TAKE NOTICE that the plaintiffs will bring on for hearing in Room 1001 of the United States Courthouse, Foley Square, New York, New York, on the 24th day of February, 1975, at 9:30 o'clock, or as soon thereafter as counsel can be heard, the attached motion seeking to permit Leslie Nameth and McKinley Humes to file amended affidavits in support of the motion to intervene and for injunctive relief.

Please take further notice that opposing affidavits and answering memorandum must be served upon counsel for plaintiffs at least three (3) days before the return date of this motion.

JANE E. BLOOM

MID-HUDSON VALLEY LEGAL SERVICES PROJECT
(Monroe County Legal Assistance Corp.)
Attorneys for Plaintiffs
50 Market Street
Poughkeepsie, New York 12601
Jane E. Bloom, of Counsel

Notice to Amend Affidavits.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs LESLIE NAMETH and MCKINLEY HUMES move this court:

(1) Pursuant to Rules 6 (b), 7, 8, 15, 23 and 24 of the Federal Rules of Civil Procedure for an order permitting Leslie Nameth and McKinley Humes to file amended affidavits in support of motion to intervene and for injunctive relief.

The ground for the motion is that it is appropriate for Leslie Nameth and McKinley Humes, members of the alleged class of plaintiffs in the main action, to file amended affidavits in support of the motion to intervene and for injunctive relief because relevant events have occurred since their original affidavits were filed.

JANE E. BLOOM

MID-HUDSON VALLEY LEGAL SERVICES PROJECT
(Monroe County Legal Assistance Corp.)
Attorneys for Plaintiffs
50 Market Street
Poughkeepsie, New York 12601
Jane E. Bloom, of Counsel

Amended Affidavit of McKinley Humes (Annexed).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

HARRY VAIL, JR., PATRICK WARD, RICHARD MCNAIR, JAMES HURRY, LESLIE NAMETH, MCKINLEY HUMES, JOSEPH RABASCO and JOANNE HARVARD, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

against

LAWRENCE M. QUINLAN, individually and in his capacity as Sheriff of Dutchess County, JOSEPH JUIDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as Judge of the Dutchess County Court, and PUBLIC LOAN COMPANY, INC., ARNOLD GORAN, M.D., P.C., and GEORGE MONTGOMERY, JR., M.D., HERBERT H. REDL, d/b/a H.H. REDL'S AUTO BODY WORKS, and W. VINCENT GRADY, in his capacity as Justice of the Supreme Court of the State of New York, and GLADYS RABASCO, and DOMESTIC FINANCE,

Defendants.

MCKINLEY HUMES, being duly sworn, deposes and says as follows:

1. I restate and reallege that allegations contained in paragraphs 1 to 19 of "AFFIDAVIT OF MCKINLEY HUMES IN SUPPORT OF MOTION TO INTERVENE AND FOR INJUNCTIVE RELIEF" sworn to on January 8, 1975.

2. Upon information and belief, on January 8, 1975, District Court Judge Thomas P. Griesa signed an Order

to Show Cause for Preliminary Injunction; Temporary Restraining Order and Intervention Pursuant to this Order, Judge Griesa ordered:

> IT IS HEREBY ORDERED, that it appearing to the Court that the defendant HERBERT H. REDL, d/b/a H.H. REDL'S AUTO BODY WORKS, will cause irreparable injury, damage and loss to LESLIE NAMETH and defendant MONTGOMERY will cause irreparable injury, damage and loss to MCKINLEY HUMES, and defendant DOMESTIC FINANCE will cause irreparable injury, damage and loss to JOANNE HARVARD, unless they are restrained from imprisoning LESLIE NAMETH, MCKINLEY HUMES, and JOANNE HARVARD, pursuant to Article 19 of the New York Judiciary Law, before adverse parties and their attorneys can be heard in opposition, defendants, HERBERT H. REDL, d/b/a H.H. REDL'S AUTO BODY WORKS, and DOMESTIC FINANCE, their subordinates, agents and attorneys, be and they are hereby RESTRAINED from imprisoning LESLIE NAMETH and MCKINLEY HUMES pursuant to Article 19, Sections 756, etc., of the New York Judiciary Law, pending a final hearing and determination of their motion for a preliminary injunction by a three-judge court or otherwise, as determined (see the Temporary Restraining Order of November 8, 1974).

3. Upon information and belief, my attorney served a copy of the Order to Show Cause of January 8, 1975, on attorneys for Lawrence Quinlan, Joseph Juidice, Raymond Aldrich, Public Loan Company, Inc., Arnold Goran, M.D., P.C., George Montgomery, Jr., M.D., Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works, W. Vincent Grady, Gladys Rabasco, and Domestic Finance.

4. On February 10, 1975, at about 10:30 A.M. deputies of defendant Quinlan came to my home and stated they

had a warrant for my arrest. They stated that unless I paid a contempt fine of $254.18, they would commit me to jail until I paid the fine.

5. I told the deputies of defendant Quinlan that I had been to Legal Services and that a Judge had signed an order stating that I was not to be arrested.

6. Deputies of defendant Quinlan informed me that they had instructions to collect the fine of $254.18 or arrest my body.

7. On February 10, 1975, deputies of defendant Quinlan arrested me and committed me to the Dutchess County Jail.

8. When I arrived at the Dutchess County Jail on February 10, 1975, I informed the Head Jailer that I should not be committed to jail because a Judge had signed an order stating that I was not to be arrested.

9. The Head Jailer informed me that he had instructions to commit or hold me in Dutchess County Jail until I paid the fine of $254.18.

10. At about 11:00 A.M. I was placed in a cell in Dutchess County Jail with Leslie Nameth.

11. At about 1:30 P.M. I was handcuffed and taken to the Dutchess County Courthouse and appeared before Judge Juidice. At that time a member of the County Attorney's office appeared and told Judge Juidice that I had been arrested and committed to the Dutchess County Jail by mistake.

12. Judge Juidice asked me how long I had been a resident of Poughkeepsie. He asked me if I planned to

leave the City. He then stated I was released from jail until I received any further notice.

13. At the time of my arrest I had no money to pay the fine. I am unable to find work and have been denied Unemployment Insurance Benefits. I am subsisting with loans from friends.

14. I pray that this Court:

(1) Enter judgment on behalf of Plaintiff Humes in the amount of $100,000 against defendant Quinlan.

(2) Enter judgment on behalf of Plaintiff Humes in the amount of $100,000 against defendant Montgomery.

15. No prior applications for similar relief have been made.

s/ McKinley Humes

(Jurat)

Amended Affidavit of Leslie Nameth (Annexed).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

LESLIE NAMETH, being duly sworn, deposes and says as follows:

1. I restate and reallege that allegations contained in paragraphs 1 and 19 of "Affidavit of Leslie Nameth in Support of Motion to Intervene and for Injunctive Relief" sworn to on January 8, 1975.

2. On January 8, 1975, upon information and belief, District Court Judge Thomas P. Griesa signed an Order to Show Cause for Preliminary Injunction; Temporary Restraining Order and Intervention. Pursuant to this Order, Judge Griesa ordered

> IT IS HEREBY ORDERED, that it appearing to the Court that the defendant Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works, will cause irreparable injury, damage and loss to Leslie Nameth and defendant Montgomery will cause irreparable injury, damage and loss to Mc Kinley Humes, and defendant Domestic Finance will cause irreparable injury, damage and loss to Joanne Harvard, unless they are restrained from imprisoning Leslie Nameth, McKinley Humes, and Joanne Harvard, pursuant to Article 19 of the New York Judiciary Law, before adverse parties and their attorneys can be heard in opposition, defendants, Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works, and Domestic Finance, their subordinates, agents and attorneys, be and they are hereby RESTRAINED from

> imprisoning Leslie Nameth and Mc Kinley Humes pursuant to Article 19, Sections 756, etc., of the New York Judiciary Law, pending a final hearing and determination of their motion for a preliminary injunction by a three-judge court or otherwise, as determined (see the Temporary Restraining Order of November 8, 1974.)

3. Upon information and belief my attorney served a copy of the Order to Show Cause of January 8, 1975, on attorneys for Lawrence Quinlan, Joseph Juidice, Raymond Aldrich, Public Loan Company, Inc., Arnold Goran, M.D., P.C., George Montgomery, Jr., M.D., Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works, W. Vincent Grady, Gladys Rabasco, and Domestic Finance.

4. On February 10, 1975, at about 10:30 A.M. deputies of defendant Quinlan came to my home and stated they had a warrant for my arrest. They stated that unless I paid a contempt fine of $94.56, they would commit me to jail until I paid the fine.

5. I told the deputies of defendant Quinlan that they must have made a mistake.

6. Deputies of defendant Quinlan informed me that they had instructions to collect the fine of $94.56 or arrest my body.

7. On February 10, 1975, deputies of defendant Quinlan arrested me and committed me to the Dutchess County Jail.

8. At about 11:00 A.M. I was placed in a cell in the Dutchess County Jail with Mc Kinley Humes.

9. At about 1:30 P.M. I was handcuffed and taken to the Dutchess County Courthouse and appeared before Judge

Amended Affidavit of Leslie Nameth (Annexed).

Juidice. At that time a member of the County Attorney's office appeared and told Judge Juidice that I had been arrested and committed to the Dutchess County Jail by mistake.

10. Judge Juidice asked me how long I had been a resident of Poughkeepsie. He told me not to leave the City. He said the Court would be in contact with me.

11. At the time of my arrest I had no money to pay the fine. My wife has applied for welfare. I have applied for Unemployment Insurance Benefits. I have savings consisting of $80 which I am using to support my family.

12. I pray that this Court:

(1) Enter judgment on behalf of plaintiff Nameth in the amount of $100,000 against defendant Quinlan for my unlawful imprisonment.

(2) Enter judgment on behalf of plaintiff Nameth in the amount of $100,000 against defendant Redl.

13. No prior applications for similar relief have been made.

s/ LESLIE NAMETH

(Jurat)

Affidavit of Jane E. Bloom (Annexed).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

JANE E. BLOOM being duly sworn deposes and says:

1. I am an attorney of record in this proceeding. I submit this affidavit in support of the motion to amend affidavits of LESLIE NAMETH and MCKINLEY HUMES.

2. Upon information and belief, on January 8, 1975, District Court Judge Thomas P. Griesa signed an Order to Show Cause for Preliminary Injunction; Temporary Restraining Order and Intervention Pursuant to this Order, Judge Griesa ordered:

> IT IS HEREBY ORDERED, that it appearing to the Court that the defendant HERBERT H. REDL, d/b/a H.H. REDL'S AUTO BODY WORKS, will cause irreparable injury, damage and loss to LESLIE NAMETH and defendant MONTGOMERY will cause irreparable injury, damage and loss to MCKINLEY HUMES, and defendant DOMESTIC FINANCE will cause irreparable injury, damage and loss to JOANNE HARVARD, unless they are restrained from imprisoning LESLIE NAMETH, MCKINLEY HUMES, and JOANNE HARVARD, pursuant to Article 19 of the New York Judiciary Law, before adverse parties and their attorneys can be heard in opposition, defendants, HERBERT H. REDL, d/b/a H.H. REDL'S AUTO BODY WORKS, and DOMESTIC FINANCE, their subordinates, agents and attorneys, be and they are hereby RESTRAINED from imprisoning LESLIE NAMETH and MCKINLEY HUMES pursuant to Article 19, Sections 756,

etc., of the New York Judiciary Law, pending a final hearing and determination of their motion for a preliminary injunction by a three-judge court or otherwise, as determined (see the Temporary Restraining Order of November 8, 1974).

3. On January 8, 1975, upon information and belief, copies of the Order to Show Cause of January 8, 1975, were served on attorneys for Lawrence Quinlan, Joseph Juidice, Raymond Aldrich, Public Loan Company, Inc., Arnold Goran, M.D., P.C., George Montgomery, Jr., M.D., Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works, W. Vincent Grady, Gladys Rabasco, and Domestic Finance.

4. On February 10, 1975, I was in Supreme Court in Dutchess County from 9:30 a.m. to 12:00 p.m. When I returned to my office at 12:00 p.m., my secretary indicated to me that Mrs. Nameth had called the office and stated that her husband was in jail and that Elizabeth Johnson had called the office and stated that McKinley Humes was in jail.

5. On February 10, 1975, at 12:05 p.m., I called the Dutchess County Jail and informed the Jailer that Leslie Nameth and McKinley Humes were committed to Dutchess County Jail contrary to the provisions of Judge Griesa's temporary restraining order of January 8, 1975. The Jailer informed me that he had instructions to arrest these individuals and that I should speak with the County Attorney.

6. On February 10, 1975, at 12:15 p.m., I called the County Attorney's office and informed Stephen Wing, an Assistant County Attorney, that Leslie Nameth and McKinley Humes had been arrested and committed to the Dutchess County Jail in violation of Judge Griesa's tem-

porary restraining order of January 8, 1975. Stephen Wing informed me that he would take care of the matter.

7. At 12:30 p.m., I phoned Stephen Wing and informed him that Leslie Nameth and McKinley Humes should be released immediately. Stephen Wing informed me that he had spoken with Judge Juidice. Judge Juidice informed him that Leslie Nameth and McKinley Humes could not be released until they appeared before him that afternoon.

8. Leslie Nameth and McKinley Humes were released in the afternoon of February 10, 1975.

9. Leslie Nameth and McKinley Humes were arrested and committed to the Dutchess County Jail in direct violation of Judge Griesa's temporary restraining order of January 8, 1975.

JANE E. BLOOM

Sworn to before me February 4, 1975
LEONA S. MALTZ

(Jurat)

Notice of Motion to Intervene.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the above-named defendants:

PLEASE TAKE NOTICE that the plaintiff will bring on for hearing in Room 1001 of the United States Courthouse, Foley Square, New York, New York, on the 28th day of February, 1975, at 9:30 o'clock, or as soon thereafter as counsel can be heard, the attached motion to intervene Richard Russell, Jr., Helen Thorpe, and Robert Harrell in this action as named party plaintiffs, and to add as party defendants Alexander Paulsen and Douglas Paulsen, d/b/a Hudson View Park Co. and Dr. George T.C. Way, M.D., and Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works. Please take notice that opposing affidavits and answering memorandum must be served upon counsel for plaintiff at least three days before the return date of this motion.

Dated: Poughkeepsie, New York
February 13, 1975

MID-HUDSON VALLEY LEGAL SERVICES PROJ.
(Monroe County Legal Assistance Corp.)
Attorneys for Plaintiffs
50 Market Street
Poughkeepsie, New York
Jane E. Bloom, of Counsel

Motion to Intervene.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Richard Russell, Jr., Helen Thorpe, and Robert Harrell move this court:

(a) Pursuant to Rules 23 and 24 (b) of the Federal Rules of Civil Procedure, to intervene in this action as named party plaintiffs,

(b) Pursuant to Rules 19a, 20a, and 21 to add as party defendants, Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works; Alexander Paulsen and Douglas Paulsen, d/b/a Hudson View Park Co., and Dr. George T. C. Way, M.D.

(c) Pursuant to Rules 6 (b), 7, 8, 23 and 24 of the Federal Rules of Civil Procedure, for an order allowing a reasonable extension of time to file a proposed intervenor's complaint, and/or deeming the affidavits of Richard Russell, Jr., Helen Thorpe and Robert Harrell, to be a verified pleading determination of this motion.

The grounds for the motion are that it is appropriate for Richard Russell, Jr., Helen Thorpe, and Robert Harrell, members of the alleged class of plaintiffs in the main action, to intervene at this early stage of the proceedings, since the facts of their cases, the legal claims they make,

and their claims for relief are all substantially identical to those of the named plaintiffs.

s/ Jane E. Bloom
JANE E. BLOOM
MID-HUDSON VALLEY LEGAL SERVICES PROJ.
(Monroe County Legal Assistance Corp.)
Attorneys for Plaintiffs
50 Market Street
Poughkeepsie, New York 12601
Jane E. Bloom, of Counsel

Affidavit of Richard Russell, Jr. (Annexed).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

RICHARD RUSSELL, JR., being duly sworn, deposes and says as follows:

1. Plaintiff Russell is a citizen of the United States and the State of New York. He resides at 139 Rombout Avenue, Beacon, New York, with his wife and infant child.

2. Plaintiff Russell is 24 years of age.

3. In 1973, plaintiff Russell leased an apartment at Hudson View Park for one year. After about (6) six months plaintiff Russell and his family moved out of their apartment because they could not afford to continue paying rent.

4. On August 1, 1973, a judgment was entered in the Justice Court of the Town of Fishkill, New York, in the case *Alexander Paulsen and Douglas Paulsen, d/b/a Hudson View Park Co.* v. *Richard Russell, Jr., and Diane Russell,* in favor of Hudson View Park and against plaintiff Russell and Diane Russell for $932.11.

5. On August 8, 1973, Thomas A. Reed, Attorney for defendant Hudson View Park, served a subopena duces tecum, requiring plaintiff Russell to appear on August 28, 1973, before a notary public at 75 Market Street, Poughkeepsie, New York, for examination concerning his property.

6. On September 28, 1973, Thomas A. Reed caused to be served a motion for instalment payments on plaintiff Russell.

7. On October 16, 1973, defendant Aldrich granted the motion for installment payments and on October 23, 1973, defendant Aldrich signed the installment payment order stating:

> ORDERED, that RICHARD RUSSELL, JR., the judgment debtor herein, be and he is directed to apply out of all monies received or to be received by him, from any source, in each and every month, on the first day thereof, commencing on the first day of November, 1973, the sum of $50.00 on account of the said judgment herein, augmented by interest accrued thereon, until such time as the balance outstanding on said judgment and interest shall have been paid in full, and it is further,
>
> ORDERED, that said monthly installments of $50.00 shall be delivered and paid over by the judgment debtor by

mailing the same to Reed & Reed, attorneys for the judgment creditor herein, at No. 75 Market Street, Poughkeepsie, New York.

8. Defendant Aldrich signed this order based upon the following facts:

> Now, upon reading and filing the notice of motion herein, and the affidavit of Thomas A. Reed, sworn to the 24th day of September, 1973, in support of said motion, and after hearing Reed & Reed, Esqs., for the judgment creditors in favor of said motion, and there being no opposition thereto and due deliberation having been had, it is motion of Reed & Reed, attorneys for the judgment creditors herein.

9. When plaintiff Russell failed to make payments in accordance with the October 23, 1973, installment payment order, defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757(1) ordering plaintiff Russell to appear at the Dutchess County Court on November 20, 1973, at 10:00 a.m. to show cause why he should not be punished as and for a contempt of the said Court and fining him for such contempt the amount of $250.00, a portion of the judgment herein, plus $10.00 costs and expenses, on the ground that the judgment debtor has in all respects refused and willfully neglected to obey the provisions of the installment payment order.

10. When plaintiff Russell failed to appear in County Court on November 20, 1973, defendant Juidice granted the motion of Thomas A. Reed, to find plaintiff Russell in contempt of court on November 21, 1973.

11. On January 21, 1974, defendant Aldrich issued the Order of Contempt pursuant to Section 770 of Article 19.

The Order of Contempt issued by defendant Aldrich stated:

> ORDERED that the defendant Richard Russell, Jr., is adjudged of a contempt of this court, which contempt defeated and impaired the rights and remedies of the plaintiffs, and it is further
>
> ORDERED that the said defendant Richard Russell, Jr., for his misconduct and willful contempt be and he is hereby fined the sum of $250 00 to be paid to the plaintiff, besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the plaintiffs by making installment payments in the amount of Twenty ($20.00) Dollars per week, commencing one week after service of a certified copy of this order. Upon payment as aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

12. When plaintiff Russell failed to comply with the Order of Contempt, defendant Aldrich issued an *ex parte* Commitment Order pursuant to Judiciary Law Article 19, Section 756 on March 8, 1974. The Commitment stated:

> Now THEREFORE, you are hereby commanded that you take the body of Richard Russell, Jr., and him closely and safely keep in your custody in the common jail of your county until he shall have paid the sum of $250.00, the fine imposed as aforesaid, also the costs and ex-

penses amounting to $10.00, and your fees hereon, or until the said Richard Russell, Jr., shall be sooner discharged by an order of the court.

13. On January 30, 1975, deputies of defendant Quinlan went to plaintiff Russell's home and arrested him pursuant to the commitment order of March 8, 1974, and committed him to the Dutchess County Jail. On January 30, 1975, deputies of defendant Quinlan arrested and held plaintiff Russell in the Dutchess County Jail pursuant to Judiciary Law Sections 756 and 774.

14. At the time of his arrest plaintiff Russell had assets consisting of $40.00 in a savings account. At the time of his arrest, plaintiff Russell was and is unemployed. He expected to begin receiving public assistance from the Dutchess County Department of Social Services in February, 1975. He and his family own no property of value other than furniture and clothing.

15. On January 30, 1975, plaintiff Russell was released from Dutchess County Jail pursuant to Judiciary Law Section 774 after his father lent him funds to pay the fine totalling $. This debt has remained unpaid due to his indigency.

16. The sum of $289.95 was delivered to a deputy of defendant Quinlan, who, upon information and belief, delivered the money to defendant Hudson View Park Co., pursuant to Section 773 of the Judiciary Law.

17. By virtue of the foregoing, plaintiff Russell was wrongfully imprisoned for approximately 3 hours, suffered mental anguish, shame and humiliation, damage to his character and reputation, damage to his credit standing,

and was wrongfully deprived of $289.95 in violation of his Fifth, Eighth, and Fourteenth Amendment rights to the United States Constitution.

18. Plaintiff Russell was deprived of his liberty and his property in the amount of the $289.95 fine without being brought before the Court prior to incarceration to answer to defendant Hudson View Park's charges or to plead his indigency in violation of his due process rights under the Fifth, and Fourteenth Amendments to the United States Constitution.

19. At no time during the course of the civil contempt proceedings was the plaintiff Russell apprised of his right to counsel in these proceedings nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel in these proceedings nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

20. Pursuant to the commitment order, plaintiff Russell was deprived of liberty because of his indigency. This deprivation of liberty constitutes a violation of his rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution by subjecting plaintiff Russell to arrest and imprisonment because of his inability to pay the fine while a person with the ability to pay the fine would not be subject to arrest or imprisonment.

21. Pursuant to the commitment order, plaintiff Russell was subjected to an indefinite term of imprisonment for the non-payment of a fine that he was financially unable to pay.

Affidavit of Richard Russell, Jr. (Annexed).

Because the indefinite term of imprisonment is disproportionate to the alleged offense, it is in violation of the ban of the Eighth Amendment to the United States Constitution on the imposition of cruel and unusual punishments.

22. Plaintiff Russell prays that this Court:

(1) Enter judgment on behalf of plaintiff Russell in the amount of $100,000 for his unlawful imprisonment.

(2) Enter judgment on behalf of plaintiff Russell in the amount of $289.95 against defendant Hudson View Park Co., the recipient of the fine unlawfully imposed in violation of the Fifth, Eighth and Fourteenth Amendments.

23. No prior applications for similar relief have been made.

s/RICHARD RUSSELL

(Jurat)

Affidavit of Helen Thorpe (Annexed).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

HELEN THORPE, being duly sworn, deposes and says as follows:

1. Plaintiff Thorpe is a citizen of the United States and the State of New York. She resides at 11-C Charles Street Court, Poughkeepsie, New York, with her five children.

2. Plaintiff Thorpe is 39 years of age.

3. On or about March, 1973, Plaintiff Thorpe's car was damaged by another car. Plaintiff Thorpe hired defendant H.H. Redl's Auto Body Works to tow her car at a fee of $15. In May, 1973, defendant Redl's Agency sent Plaintiff Thorpe a bill for $78 for storage and towing. At advice of her insurance company, Plaintiff Thorpe paid defendant Redl's Agency $35, the value of the services.

4. On June 28, 1974, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *Herbert H. Redl, d/b/a H.H. Redl's Auto Body Works* v. *Helen Thorpe* in favor of Herbert H. Redl and against Plaintiff Thorpe for $112.75.

5. On August 3, 1974, Thomas A. Reed, Attorney for defendant Redl served a subpoena duces tecum, requiring Plaintiff Thorpe to appear on August 15, 1974, before a notary public at 75 Market Street, Poughkeepsie, New York, for the taking of a deposition regarding all matters

relevant to the satisfaction of the judgment of June 28, 1974, and to produce certain records.

6. When Plaintiff Thorpe failed to appear on August 15, 1974, Defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757 (1) ordering Plaintiff Thorpe to appear at the Dutchess County Court on September 10, 1974, at 10:00 a.m. to "show cause why she should not be punished as for contempt for violation of and non-compliance with the said subpoena in that she failed to appear or respond pursuant thereto . . ."

7. When Plaintiff Thorpe failed to appear on September 10, 1974, the hearing on the Order to Show Cause was adjourned to September 24, 1974, at 10:00 a.m.

8. When Plaintiff Thorpe failed to appear in County Court on September 24, 1974, Defendant Juidice issued an Order of Contempt, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Thorpe in contempt.

9. When Plaintiff Thorpe failed to comply with the Order of Contempt, Defendant Juidice issued an *ex parte* Commitment Order pursuant to Judiciary Law Article 19, Section 756.

10. On February 4, 1975, Plaintiff Thorpe was arrested by deputies of defendant Quinlan at her job at Ward 18, Main Building, Hudson River State Hospital, pursuant to the Order of Commitment and committed her to the Dutchess County Jail.

11. The deputies of defendant Quinlan arrested and held Plaintiff Thorpe in the Dutchess County Jail pursuant to Judiciary Law Sections 756 and 774.

12. The Plaintiff was released from Dutchess County Jail pursuant to Judiciary Law Section 774, after her nephew lent her funds to pay the fine totalling $139.63.

13. The sum of $139.63 was delivered to a deputy of defendant Quinlan who, upon information and belief, delivered the money to defendant Redl's Agency pursuant to Section 773 of the Judiciary Law.

14. By virtue of the foregoing, plaintiff Thorpe was wrongfully imprisoned for approximately three hours, suffered mental anguish, shame and humiliation, damage to her character and reputation, damage to her credit standing, and was wrongfully deprived of $139.63 in violation of her Fifth, Eighth, and Fourteenth Amendment rights to the United States Constitution.

15. Plaintiff Thorpe contends that the imposition of the fine and the punishment of imprisonment is violative of her rights secured by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

16. With respect to the fine of $139.63, Plaintiff Thorpe contends that Defendant Juidice wrongfully impose the fine without affording her the procedural right to answer Defendant Redl's charge of contempt or to challenge the amount of the fine imposed in violation of her right to due process secured by the Fifth and Fourteenth Amendments.

17. Plaintiff Thorpe has not been apprised of her right to counsel in this proceeding nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for persons in violation of the right to counsel secured by the Fifth and Fourteenth Amendments.

Affidavit of Helen Thorpe (Annexed).

18. Plaintiff Thorpe contends that the imprisonment that occurred due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

19. Plaintiff Thorpe currently supports herself and five children on $87 she earns every week from her employment at Hudson River State Hospital and partial assistance she receives from Dutchess County Department of Social Services. She had no assets or funds available to pay the fine besides money she had set aside to pay her rent.

20. Plaintiff Thorpe prays that this Court:

(1) Enter judgment on behalf of Plaintiff Thorpe in the amount of $100,000.00 for her unlawful imprisonment.

(2) Enter judgment on behalf of Plaintiff Thorpe in the amount of $139.63 against defendant Redl's Agency, the recipient of the fine unlawfully imposed in violation of the Fifth, Eighth, and Fourteenth Amendments.

21. No prior application for similar relief has been made.

s/ HELEN THORPE

(Jurat)

Affidavit of Evella Harrell (Annexed).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

EVELLA HARRELL, being duly sworn, deposes and says as follows:

1. Plaintiff Harrell is a citizen of the United States and the State of New York. Until February 13, 1975, he resided at 201 Winnikee Street, Poughkeepsie, New York, with me, his wife, and his six children. On February 13, 1975, he left home having become depressed by his inability to find work and support his family.

2. Plaintiff Harrell is 42 years of age.

3. On or about 1972, I received medical services from Defendant Way.

4. On May 8, 1974, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *George T.C. Way* v. *Robert H. Harrell and Evella Harrell,* in favor of George T.C. Way, M.D. and against Plaintiff Harrell and Evella Harrell for $345.98.

5. Upon information and belief, on May 17, 1974, Thomas A. Reed, Attorney for Defendant Way served by mail a subpoena duces tecum, requiring Plaintiff Harrell to appear on June 5, 1974, before a notary public at 75 Market Street, Poughkeepsie, New York, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of May 8, 1974, and to produce certain records.

6. Upon information and belief, when Plaintiff Harrell failed to appear on June 5, 1974, Defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757 (1) ordering Plaintiff Harrell to appear at the Dutchess County Court on July 2, 1974, at 10:00 a.m. to "show cause why he should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

7. Upon information and belief, when Plaintiff Harrell failed to appear on July 2, 1974, the hearing on the Order to Show Cause was adjourned to July 9, 1974, at 10:00 a.m.

8. Upon informtion and belief, when Plaintiff Harrell failed to appear in County Court on July 9, 1974, Defendant Juidice issued an Order of Contempt July 9, 1974, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Harrell in contempt and ordering:

> ORDERED that the said defendant Robert Harrell for his misconduct and willful contempt be and he is hereby fined the sum of $250.00 to be paid to the plaintiff, besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the plaintiff, by making installment payments in the amount of Twenty ($20.00) dollars per week, commencing one week after service of a certified copy of this order. Upon payment as aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

9. Upon information and belief, when Plaintiff Harrell failed to comply with the Order of Contempt, defendant Juidice issued an ex parte commitment order pursuant to Judiciary Law Article 19, Section 756.

10. On October 2, 1974, deputies of defendant Quinlan went to Plaintiff Harrell's home and arrested him pursuant to the commitment order and committed him to the Dutchess County Jail.

11. On October 2, 1974, Plaintiff Harrell was released from Dutchess County Jail pursuant to Judiciary Law Section 774, after his mother and sister lent him funds to pay the fine totalling $283.75. This debt has remained unpaid due to his indigency.

12. The sum of $283.75 was delivered to a deputy of defendant Quinlan, who, upon information and belief, delivered the money to defendant Way pursuant to Section 773 of the Judiciary Law.

13. Upon information and belief, on November 20, 1974, Thomas A. Reed, Attorney for Defendant Way served by mail a subpoena duces tecum, requiring Plaintiff Harrell to appear on December 5, 1974, before a notary public at 75 Market Street, Poughkeepsie, New York, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of May 8, 1974, and to produce certain records.

14. Upon information and belief, when Plaintiff Harrell failed to appear on December 5, 1974, Defendant Aldrich issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757 (1) ordering Plaintiff Harrell to appear at the Dutchess County Court on December 31, 1974, at 10:00 a.m. to "show cause why he

should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

15. When Plaintiff Harrell failed to appear on December 31, 1974, the hearing on the Order to Show Cause was adjourned to January 7, 1975, at 10:00 a.m.

16. When Plaintiff Harrell failed to appear in County Court on January 7, 1975, Defendant Juidice issued an Order of Contempt on August 14, 1973, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Harrell in contempt and ordering:

> ORDERED, that the said defendant Robert Harrell for his misconduct and willful contempt be and he is hereby fined the sum of $128.98 to be paid to the plaintiff, besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the Plaintiff, by making installment payments in the amount of Twenty ($20.00) dollars per week, commencing one week after service of a certified copy of this order. Upon payment as aforesaid, the said defendant shall be deemed purged to his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

17. Upon information and belief, Defendant Juidice issued the Order of Contempt based upon the following:

> Upon reading and filing the Order to Show Cause dated the 9th day of December, 1974, with due proof

> of service thereof on the defendant, Robert Harrell, the affirmation of Thomas A. Reed dated the 6th day of December, 1974, and upon all the pleadings and proceedings heretofore had herein, and after hearing Reed & Reed, Esqs., Thomas A. Reed, of counsel, for the plaintiff in support of said motion, and there being no opposition thereto . . .

18. Upon information and belief, when Plaintiff Harrell failed to comply with the Order of Contempt, Defendant Juidice issued an *ex parte* commitment order pursuant to Judiciary Law Article 19, Section 756.

19. Upon information and belief, on February 7, 1975, deputees of defendant Quinlan went to Plaintiff Harrell's job and arrested him pursuant to the commitment order and committed him to the Dutchess County Jail.

20. On February 7, 1975, plaintiff Harrell was released from Dutchess County Jail pursuant to Judiciary Law Section 774 after his brother and sister lent him funds to pay the fine totalling $156.67. This debt has remained unpaid due to his indigency.

21. The sum of $156.67 was delivered to a deputy of defendant Quinlan, who, upon information and belief, delivered the money to defendant Way pursuant to Section 773 of the Judiciary Law.

22. At the time of his arrest, plaintiff was working on a part-time basis and had no funds to pay the fine.

23. By virtue of the foregoing, plaintiff Harrell was wrongfully imprisoned on two occasions, for approximately 6 hours, suffered mental anguish, shame and humiliation, damage to his character and reputation, damage to his

credit standing, and was wrongfully deprived of $283.75 on one occasion and $156.67 on another occasion in violation of his Fifth, Eighth, and Fourteenth Amendment rights to the United States Constitution.

24. Plaintiff Harrell was deprived of his liberty and his property in the amount of the $283.75 fine plus $156.67 fine without being brought before the Court prior to incarceration to answer to defendant Way's charges or to plead his indigency in violation of his due process rights under the Fifth, and Fourteenth Amendments to the United States Constitution.

25. At no time during the course of the civil contempt proceedings was the plaintiff Harrell apprised of his right to counsel in these proceedings nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

26. Pursuant to the commitment order, plaintiff Harrell was deprived of liberty because of his indigency. This deprivation of liberty constitutes a violation of his rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution by subjecting plaintiff Harrell to arrest and imprisonment because of his inability to pay the fine while a person with the ability to pay the fine would not be subject to arrest or imprisonment.

27. Pursuant to the commitment order, plaintiff Harrell was subjected to an indefinite term of imprisonment for the non-payment of a fine that he was financially unable to pay. Because the indefinite term of imprisonment is

disproportionate to the alleged offense, it is in violation of the ban of the Eighth Amendment to the United States Constitution on the imposition of cruel and unusual punishments.

28. Evella Harrell prays that this Court:

(1) Enter judgment on behalf of plaintiff Harrell in the amount of $100,000 for his unlawful imprisonments.

(2) Enter judgment on behalf of plaintiff Harrell in the amount of $440.42 against defendant Way the recipient of the fine unlawfully imposed in violation of the Fifth, Eighth, and Fourteenth Amendments.

29. I submit this affidavit for Robert Harrell because on February 13, 1975, Robert Harrell left home. I do not know where he went. I do know that he left because of severe depression regarding his inability to support his family.

30. No prior applications for similar relief have been made.

s/ Evella Harrell

(Jurat)

Answer (Defendant Quinlan).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

LAWRENCE M. QUINLAN, defendant herein, by his undersigned counsel, answers the complaint and complaining affidavits herein as follows:

ANSWERING PARAGRAPHS 1-94 OF THE ORIGINAL COMPLAINT

I. Respectfully refers to the cited sections of the Judiciary Law for the provisions thereof and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraphs 1, 2 and 3.

II. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 4 and 5.

III. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6.

IV. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 7, 8 and 9.

V. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 10 and 11.

Answer (Defendant Quinlan).

VI. Admits the allegations of paragraphs 12 and 13 of said complaint and denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 14, 15 and 16.

VII. A. (1) Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 34.

(2) Admits the allegations of paragraphs 29, 30, 31, 32 and 33.

(3) Admits that plaintiff Vail was released from Dutchess County Jail on October 2, 1974 and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 35.

(4) Admits that the sum of $294.25, as entered in the records of defendant Quinlan, included $250.00 for the amount, $20.00 for costs, $7.50 for service fees, $1.00 for mileage fees, $13.50 for poundage, $.25 for an affidavit and $2.00 for C. & D., and that said sum was delivered to a deputy of defendant Quinlan, and that thereafter the sum of $280.55 was remitted to defendant Public Loan's attorney, and except as so admitted, denies the remaining allegations of paragraphs 36 and 37.

(5) Denies that defendant Quinlan acted wrongfully, alleges that his acts were lawful and proper under and in accordance with applicable prevailing law, and denies knowledge or information sufficient to form

a belief as to the truth of the remaining allegations of paragraphs 38, 39, 40, 41 and 42.

B. (1) Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 and 61.

C. (1) Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 81 and 82.

(2) Admits the allegations of paragraph 73.

(3) Admits that plaintiff McNair remained in Dutchess County Jail on February 21, 1974 until he paid the sum of $283.75 ($250.00, plus $10.00 costs, $7.50 service, $13.00 poundage, $1.00 mileage, $.25 affidavit and and $2.00 C. & D.) and except as so admitted, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 74.

(4) Admits that the sum of $283.75 was delivered to a deputy of defendant Quinlan and that thereafter the sum of $270.75 was remitted to defendant Montgomery's attorney and except as so admitted denies the remaining allegations of paragraph 75.

(5) Denies that defendant Quinlan acted wrongfully, alleges that his acts were lawful and proper under and in accordance with applicable prevailing law, and denies knowledge or information sufficient to

form a belief as to the truth of the remaining allegations of paragraphs 76, 77, 78, 79 and 80.

VIII. Restates and realleges all of the above in answer to paragraph 83, respectfully refers to the cited Amendments to the Constitution and Article of the Judiciary Law for the provisions thereof and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraphs 84 and 85.

IX. Restates and realleges all of the above in answer to paragraph 86, respectfully refers to the cited Amendment to the Constitution and Article of the Judiciary Law for the provisions thereof and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraphs 87 and 88.

X. Restates and realleges all of the above in answer to paragraph 89, respectfully refers to the cited Amendment to the Constitution and Article of the Judiciary Law for the provisions thereof and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraphs 90 and 91.

XI. Restates and realleges all of the above in answer to paragraph 92, respectfully refers to the cited Amendment to the Constitution and Article of the Judiciary Law for the provisions thereof and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraphs 93 and 94.

Answer (Defendant Quinlan).

ANSWERING THE COMPLAINING AFFIDAVITS OF PLAINTIFF LESLIE NAMETH

XII. A. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 through 16, inclusive, of the affidavit sworn to January 7, 1975.

B. With respect to the affidavit sworn to February 11, 1975:

(1) Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3, 5, 10, 11, 12 and 13.

(2) Admits the allegations of paragraphs 4, 6, 7 and 8.

(3) Admits that, according to defendant Quinlan's records, at 1:55 P. M. deputies took him before Hon. Joseph Juidice, Dutchess County Court, and he was released in Court, and except as so admitted, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 9.

ANSWERING THE COMPLAINING AFFIDAVITS OF PLAINTIFF MCKINLEY HUMES

XIII. A. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 through 19, inclusive, of the affidavit sworn to January 8, 1975.

B. With respect to the affidavit sworn to February 11, 1975:

Answer (Defendant Quinlan).

(1) Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3, 5, 8, 9, 12, 13 and 14.

(2) Admits the allegations of paragraphs 4, 6, 7 and 10.

(3) Admits that, according to defendant Quinlan's records, at 1:55 P. M. deputies took him before Hon. Joseph Juidice, Dutchess County Court, and he was released in Court, and except as so admitted, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 11.

ANSWERING THE COMPLAINING AFFIDAVIT OF JOSEPH RABASCO

XIV. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 through 15, inclusive, of the affidavit sworn to January 8, 1975.

ANSWERING THE COMPLAINING AFFIDAVIT OF PLAINTIFF JOANNE HARVARD

XV. With respect to the affidavit sworn to January 8, 1975:

(1) Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 through 10 and 16 through 28, thereof.

(2) Admits the allegations of paragraphs 11 and 12.

Answer (Defendant Quinlan).

(3) Admits that plaintiff Harvard was released from Dutchess County Jail on November 21, 1974 upon payment of the sum of $214.24 and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 13.

(4) Admits that the sum of $294.25 was delivered to a deputy of defendant Quinlan and that thereafter the sum of $278.25 was remitted to defendant Domestic Finance's attorney, and except as so admitted, denies the remaining allegations of paragraph 14.

(5) Denies the defendant Quinlan acted wrongfully, alleges that his acts were lawful and proper under and in accordance with applicable prevailing law, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 15 thereof.

ANSWERING THE COMPLAINING AFFIDAVIT OF PLAINTIFF JAMES HURRY

XVI. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 through 23, inclusive, of the affidavit sworn to December 31, 1974.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

XVII. Plaintiffs fail to state a cause of action upon which relief may be granted to plaintiffs against defendant Quinlan.

Answer (Defendant Quinlan).

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

XVIII. Defendant Quinlan's actions were without malice, in law or in fact, to any of the plaintiffs, were taken and carried out in the actual and good faith belief that they were his obligations and responsibilities under the law of the State of New York, and were in fact and in law his obligations and responsibilities under the law of the State of New York.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

XIX. Plaintiffs are estopped from seeking, and may not in law or equity seek damages from defendant Quinlan on account of the actions defendant Quinlan was required by law to take because of plaintiffs' deliberate election to disregard and disobey the prior orders of the Courts of New York.

WHEREFORE on behalf of defendant Lawrence M. Quinlan, individually and in his capacity as Sheriff of Dutchess County, it is respectfully prayed that the prayers for damages against him for unlawful imprisonment be dismissed, that the complaints against him be dismissed in all respects, and that he have such further relief as shall be just, proper and equitable.

CHARLES F. McMORROW, Esq.
Attorney for Defendant Quinlan

BY S/
JOEL T. CAMCHE, Esq.,
Of Counsel
500 Fifth Avenue
New York, N. Y. 10036
(212) 565-5431

Answer (Herbert H. Redl).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, by its attorneys, Reed & Reed, answers the complaint and complaining affidavits herein as follows:

1. Respectfully refers to the enumerated sections of the New York State Judiciary Law and the United States Constitution, and as amended, for the provisions thereof and otherwise denies knowledge or information sufficient to form a belief as to the truth of the remaining paragraphs of the complaint Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, and Nos. 17 through 82 inclusive.

2. Admits the allegations contained in the paragraphs of the complaint Nos. 12, 13, and 16.

3. Repeats and realleges all of the above in answer to paragraph 83 of the complaint.

4. Admits the allegations contained in the paragraph of the complaint No. 84.

5. Denies the allegations contained in the paragraph of the complaint No. 85.

6. Repeats and realleges all of the above in answer to paragraph No. 86 of the complaint.

7. Admits the allegations contained in the paragraph of the complaint No. 87.

Answer (Herbert H. Redl).

8. Denies the allegations contained in the paragraph of the complaint No. 88.

9. Repeats and realleges all of the above in answer to paragraph No. 89 of the complaint.

10. Admits the allegations contained in the paragraph of the complaint No. 90.

11. Denies the allegations contained in the paragraph of the complaint No. 91.

12. Repeats and realleges all of the above in answer to paragraph No. 92 of the complaint.

13. Admits the allegations contained in the paragraph of the complaint No. 93.

14. Denies the allegation contained in the paragraph of the complaint No. 94.

ANSWERING THE COMPLAINING AFFIDAVIT OF PLAINTIFF LESLIE NAMETH

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs Nos. 2, 11, and 16 of the affidavit sworn to January 7, 1975.

16. Admits the allegations contained in the paragraphs of the affidavit sworn to January 7, 1975, Nos. 3 through 10 inclusive.

17. Denies the allegations contained in the paragraphs of the affidavit sworn to January 7, 1975, Nos. 12, 13, 14 and 15.

Answer (Herbert H. Redl).

ANSWERING THE COMPLAINING AMENDED AFFIDAVIT OF PLAINTIFF LESLIE NAMETH

18. Repeats and realleges all of the above in answer to paragraph No. 1 of the affidavit sworn to February 11, 1975.

19. Admits the allegations contained in the paragraphs of the affidavit sworn to February 11, 1975, No. 2.

20. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph No. 3 of the affidavit sworn to February 11, 1975, except admits a copy of the Order to Show Cause of January 8, 1975, was served on the attorneys for Herbert H. Redl.

21. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraphs 4 through 11 inclusive and No. 13 of the affidavit sworn to February 11, 1975.

22. Denies the allegations contained in paragraph No. 12 of the affidavit sworn to February 11, 1975.

FOR A FIRST AFFIRMATIVE DEFENSE

23. The complaint and complaining affidavits of the plaintiff Leslie Nameth fail to state a claim or cause of action as against defendant Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE

24. The Court lacks subject matter jurisdiction as to the defendant Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, in that the said defendant did no act or acts involving the arrest or imprisonment of the plaintiff Leslie

Answer (Herbert H. Redl).

Nameth or otherwise do anything violative of the rights of said plaintiff and the said plaintiff could not have been damaged by said defendant and, therefore, the Court lacks subject matter jurisdiction.

FOR A THIRD AFFIRMATIVE DEFENSE

25. Defendant Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, by and through his attorneys, proceeded to collect a debt justly due him, strictly in accordance with the law and statutes of the State of New York provided therefore, and said defendant did no act or acts violative of the rights of the plaintiff Leslie Nameth and, therefore, could not have damaged the said plaintiff and the complaint and the affidavits should be dismissed.

WHEREFORE, defendant Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works, demands judgment against plaintiff Leslie Nameth, dismissing the complaint and dismissing the demand and prayer for damages against said defendant, together with the costs and disbursements of this action, and for such other and further relief as to this Court may be just and proper.

Dated: Poughkeepsie, New York
March 18, 1975

REED & REED
by THOMAS A. REED
Thomas A. Reed

Attorneys for Defendant
Herbert H. Redl
d/b/a H. H. Redl's Auto Body Works,
75 Market Street
Poughkeepsie, New York 12601
Tel. (914) 454-4340

Answer (Public Loan Company).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Public Loan Company Inc., by its attorneys Golenbock and Barell for its answer to the complaint herein, alleges upon information and belief as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs Nos. "1", "2", "3", "7", "8", "9", "10", "11", "12", "13", "15", "16", "18", "19", "20", "21", "22", "23", "24", "25", "26", "27", "29", "30", "31", "32", "33", "34", "35", "36", and "37".

SECOND: Admits the allegations contained in paragraphs Nos. "14", "84", "87", "90" and "93" of the complaint herein.

THIRD: In response to the allegations contained in Paragraph "17", admits entering into an agreement with plaintiff Vail and begs leave to refer to same for the precise terms and contents thereof.

FOURTH: Denies the allegations contained in paragraphs Nos. "4", "5", "6", "28", "38", "39", "40", "41", "42", "85", "88", "91" and "94" of the complaint herein.

FIFTH: Denies any knowledge or information sufficient to form a belief as to the truth of the allegations in the complaint set forth on behalf of plaintiffs other than plaintiff Vail and contained in paragraphs Nos. 43 through 82 inclusive.

Answer (Public Loan Company).

FIRST AFFIRMATIVE DEFENSE

SIXTH: The complaint fails to state a claim as against defendant Public Loan Company, Inc., upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

SEVENTH: Defendant Public Loan Company, Inc., through its attorney, proceed strictly in accordance with valid and existing laws of the State of New York, and the rights and obligations provided for thereunder.

THIRD AFFIRMATIVE DEFENSE

EIGHTH: Defendant Public Loan Company, Inc., lawfully attempted to collect a debt due and owing to it; if any harm was in fact suffered by plaintiff, Vail, it was in no way caused or brought about by defendant Public Loan Company, Inc.

WHEREFORE, defendant Public Loan Company, Inc., demands judgment against plaintiffs dismissing the complaint herein, together with the costs and disbursements of this action, and such other and further relief which the Court deems just and proper.

Dated: New York, New York

By s/ ARTHUR SILVERMAN
A Member of the Firm

GOLENBOCK AND BARELL
Attorneys for Defendant
Public Loan Company, Inc.
60 East 42nd Street
New York, New York 10017
Tel. (212) 986-3300

Answer (George Montgomery, M.D.).

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4773 JMC

HARRY VAIL, JR., PATRICK WARD, and RICHARD MCNAIR, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

—against—

LAWRENCE M. QUINLAN, individually and in his capacity as Sheriff of Dutchess County, JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as Judge of the Dutchess County Court, and PUBLIC LOAN COMPANY, INC., ARNOLD GORAN, M.D., P.C., and GEORGE MONTGOMERY, JR., M.D.,

Defendants.

George Montgomery, Jr., M.D., named as defendant in the above action, through his attorneys, Garrity & Dietz, Esqs., answering the Complaint herein, respectfully shows and alleges:

1. Denies knowledge or information sufficient to form belief as to each and every allegation of the Paragraphs of the Complaint herein designated as "7", "8", "9", "10", and "11".

2. Denies each and every allegation of the Paragraph of the Complaint herein designated as "62" except admits that the defendant, George Montgomery, Jr., M.D., as an

employee of Dr. George W. T. Way, M.D., rendered certain medical services to one, Virginia McNair, for which a charge of $318.42 was made by the said Dr. Way.

3. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in the Paragraphs of the Complaint herein designated as "63" to "82", inclusive.

4. Denies each and every allegation contained in the Paragraph of the Complaint herein designated as "85", "88", "91", and "94".

WHEREFORE, defendant respectfully prays that the above entitled action be dismissed as against him, together with the costs of this action.

Dated: February 26, 1975, at
Poughkeepsie, New York

Yours, etc.,

GARRITY & DIETZ, Esqs.

By: s/ John B. Garrity
John B. Garrity, Attorneys for
Defendant, GEORGE MONTGOMERY, JR., M.D.
Office & P.O. Address
59 Academy Street
P. O. Box 5250
Poughkeepsie, New York 12601
Tele: (914) 471-4220

Notice of Motion to Dismiss (State Judicial Defendants).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the memorandum of law to be submitted in accordance with the scheduling order of the three-judge court, the undersigned will move this Court on the 4th day of April, 1975, in Room , United States Courthouse, Foley Square, New York, New York at 11:30 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order dismissing the complaint pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(1) and (6), for lack of subject matter jurisdiction, failure to state facts sufficient to constitute a cause of action, res judicata and collateral estoppel, full faith and credit clause of the United States Constitution, and comity between the federal and state courts and for such other and further relief as may be just and proper.

Dated: New York, New York
March 12, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants, Judges Juidice and Aldrich

Notice of Motion to Dismiss (State Judicial Defendants).

By
s/
A. SETH GREENWALD
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

Opinion (and Order) of Three-Judge Court (Reproduced at Jurisdictional Statement 1a).

Class Action Memorandum (Reproduced at Jurisdictional Statement 17a).

Order to Show Cause (January 14, 1976).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the annexed affidavit of A. Seth Greenwald, sworn to January 12, 1976, and upon the order of the Court docketed January 7, 1976 and all prior proceedings, let the plaintiffs show cause before this Court at the United States Courthouse, Foley Square, Room 2704, New York, New York, on January 15, 1976 at 2:15 P.M. why an order should not be entered;

Staying the order of the Court for 60 days or until further order of the Supreme Court of the United States, and upon such terms as may be just and proper;

Amending the order of the Court, pursuant to F.R.C.P. Rule 59, and

IT IS ORDERED that telephonic notice of this order to show cause together with the papers upon which it is based be made by day of January, 1976, be deemed sufficient.

Dated: New York, New York
January 14, 1976

s/ L. M. M.
U.S.D.J.

Affidavit of A. Seth Greenwald (Annexed).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. Seth Greenwald, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Juidice and Aldrich, and pro se pursuant to New York Executive Law § 71. I make this affidavit in support of the relief requested in the order to show cause as elaborated herein.

On January 7, 1976 this Court entered an order which declared unconstitutional and enjoined *in toto* Judiciary Law §§ 756, 757, 770, 727, 773, 774 and 775. This is a substantial portion of Article 19 of the Judiciary Law which deals with contempts; in particular the invalidated sections relate to the procedure in New York State courts to punish and provide sanctions for civil contempts. As a consequence, at the present time there is no statute in New York which even provides a procedure to punish a person for civil contempt. The present situation is exemplified by the directive of the Sheriff of the City of New York, New York Law Journal, January 12, 1976, p. 1 (Exhibit "A" annexed).

Unless some relief from the order is provided there appears to be no way the courts of the State of New York can provide sanctions for civil contempts. While the Legislature can act this can take time and in view of the con-

tinuing fiscal crisis, the drafting of a new Judiciary Law Art. 19 is not a top priority.

In the circumstances, at the very least the statutes invalidated should be allowed to operate if the deficiencies noted by this Court are remedied, by statute or court order. Thus at p. 10 of this Court's opinion the plaintiffs alleged four independent points of lack of due process. The Court accepted all. As a consequence the order declaring the several statutes unconstitutional should be modified to allow use of same if:

(1) The adjudication of contempt and order of imprisonment follows a hearing wherein the respondent is present;

(2) The order or warrant of attachment under Judiciary Law § 757 must contain clear warning that the respondent may be subject to imprisonment;

(3) That at the hearing on contempt the respondent be advised of his right to assigned counsel if indigent; and

(4) That any fine or imprisonment imposed be coercive and not punitive, based on ability to comply.

It should be noted that in a similar situation, *Sugar* v. *Curtis Circulation Co.*, 74 Civ. 78,383 F. Supp. 643, (S.D.N.Y.), invalidating the attachment statute, CPLR Article 62, the judgment entered provided that the statute involved was enjoined "until and unless a meaningful opportunity to vacate an attachment is provided under CPLR 6223 or by the Courts of the State of New York . . . (Jurisd. Statement, 32a). The quoted portion covered the objection of the three-judge court in *Sugar*. Further the Court stay the judgment pending an appeal to the Supreme Court.*

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* The appeal has since been accepted for hearing by the Supreme Court and will be argued January 20, 1976, *sub nom. Carey* v. *Sugar*.

The resettling of the order is necessary since the invalidated sections were not found unconstitutional for what they provided, but rather what they did not provide and what the Court held was the State court's application of same. These objections can be cured by the suggested conditions. It is not necessary or judicious to totally eliminate the statutes.

It is also emphasized that this Court entered a final order and injunction against the operation of the cited statutes. However the plaintiffs were moving for a preliminary injunction and the defendants were moving to dismiss. Neither the Attorney General nor his clients had put in an answer. The plaintiffs had not requested, at this point, final relief so far as I know. Certainly the indigency of the plaintiffs was at issue and there was no claim that the facts were undisputed.

Without a trial final relief seems unwarranted and unjustified. While this Court saw Mr. Vail as "typical", Opinion p. 8, and assumed as a fact his indigency this was not proven. Actually the defendants cited the lack of indigency of several plaintiffs (James Hurry and Leslie Nameth—Att. Gen. Br. pp. 3 and 4) based on their own allegations. Certainly there was no motion or record on which to base a final judgment.

Obviously, this Court would grant plaintiffs' motion but that was for a preliminary judgment, not a final order.

In any event, justice can be done and New York left with a civil contempt statute if the relief requested is granted. Otherwise much confusion will result in the months ahead if recalcitrant judgment debtors and others cannot be brought before the bar of justice.

WHEREFORE, your deponent respectfully requests that the relief from the order be granted.

s/ A. SETH GREENWALD

(Jurat)

Exhibit "A".

New York Law Journal, p. 1

NEW YORK, MONDAY, JANUARY 12, 1976

Action Follows Voiding of State Statutes

Sheriff to Halt Efforts to Jail Husbands Who Owe Alimony

By Alan Kohn

As the result of a federal court ruling, the city Sheriff's Office no longer will enforce civil contempt orders jailing husbands who are in arrears in alimony and support payments.

The office's counsel, Paul Weinstein, said this was one of the effects of a ruling last week by a three-judge federal constitutional court that invalidated seven New York State statutes dealing with the jailing of debtors for civil contempt.

Federal Ruling

The court in *Vail* v. *Quinlan, Law Journal Jan. 8,* enjoined statutes that allow a judgment debtor who has failed to comply with a disclosure subpoena concerning his ability to satisfy the debt to be held in contempt, fined and imprisoned without a hearing.

"Noting the opinion of the . . . court," said Mr. Weinstein, ". . . the sheriff . . . hereby notifies the . . . bar that effective immediately, he is prohibited from acting on or executing any arrest order, warrant or commitment for civil contempt.

"The sole exception to the statement is an arrest pursuant to CPLR 6101.1."

CPLR 6101.1 authorizes a prejudgement order of arrest where a judge finds an alleged debtor guilty of fraud, conversion or deceit. The sheriff must bring the person before the court within forty-eight hours. Women are exempted from the provision.

Criminal Contempt

"With regard to incarceration for criminal contempt," Mr. Weinstein said, "the sheriff may act upon and execute such orders. The sections of the Judiciary Law which govern commitment for criminal contempt . . . 750, 751 and 752, were not passed on by the court and therefore remain valid.

"Therefore, it is the determination of this office that without a stay of the court's decision or an appeal . . . or legislative action, the sheriff may arrest and incarcerate upon process or a pre-judgment order based upon conversion, fraud or deceit. Females would not be subject to arrest for civil contempt."

A spokesman for the office of Attorney General Louis J. Lefkowitz said the state was studying whether to appeal. Ordinarily in such cases, he said, the court seeks a stay or some form of interim relief. The state has until next Monday to decide.

Arrears Problem

Mr. Weinstein explained that most orders holding a husband in civil contempt for failure to pay alimony and support come from Section 245 of the Domestic Relations Law. The section becomes operative through sections of Article 19 of the Judiciary Law that the court declared unconstitutional.

He also noted that Section 23 of the state Civil Rights Law prohibits the arrest of anyone in a civil proceeding unless it is done according to a statute.

Supplemental Affidavit of A. Seth Greenwald.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Juidice and Alrich and pro se pursuant to Executive Law § 71. I make this Supplemental Affidavit in support of the pending resettling of the order based on the order to show cause signed January 14, 1976, and the argument before the three-judge court on January 17, 1976.

I wish to invite the Court's attention to *Agur* v. *Wilson*, 498 F. 2d 961 (2d Cir. 1974), *cert. denied* 419 U.S. 1972, *reh. den.* 420 U.S. 939. In this case the Second Circuit held that there was no substantial constitutional question involved in a challenge to, *inter alia*, N.Y. Judiciary Law §§ 770, 772, 774, subd. 1. While the Circuit did not consider specifically all the invalidated sections in the instant case, I submit that the decision is controlling on this Court, which is still a District Court sitting in the Second Circuit.

While, as in any case, the fact of *Agur* are different from the instant case, the civil contempt process is the same. Most significantly, where a litigant has failed to present his claim of indigency to the state court or refuses to attend the hearing, he can be incarcerated for civil contempt; *Agur, supra* at 965-966.

Supplemental Affidavit of A. Seth Greenwald.

At the very least, *Agur* indicates a substantial chance of success by appellants on appeal and warrants a stay of the order by this Court pending an appeal to the United States Supreme Court. I would suggest eliminating the "for sixty days" in the second line, last paragraph on page 2 of my proposed order and adding to the bar on imprisonment—"in the interim", in the last line, last paragraph, second page, the proviso, "if not represented by counsel unless the subpoena or order to show cause contains adequate warning that failure to appear for the subpoena or hearing may result in your imprisonment."

It is submitted that the *Agur* decision warrants a stay in the manner requested. It should also be noted that Circuit Judge Lumbard was a member of the panel in *Agur* v. *Wilson, supra.*

Further it is suggested that the Court consider the opinion rendered herein in light of *Agur* v. *Wilson, supra.*

WHEREFORE, your deponent respectfully requests that defendants' order be signed with the further modification as indicated herein, and take such other and further action as may be just and proper in the circumstances.

s/ A. SETH GREENWALD

(JURAT)

Order (Appealed From) (Reproduced at Jurisdictional Statement 19a).

Notice of Appeal (Reproduced at Jurisdictional Statement 21a).

Order Granting Stay (Justice Marshall) (Reproduced at Jurisdictional Statement 23a).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75 - 1397

JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

-against-

HARRY VAIL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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MID-HUDSON VALLEY LEGAL SERVICES PROJECT
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50 Market Street
Poughkeepsie, New York 12601
Tel. No. (914) 452-7911

IN THE

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Appellants,

-against-

HARRY VAIL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellees, pursuant to Rule 16(1)(c) and 16(1)(d) of the Rules of the Supreme Court of the United States, move to affirm the judgment of the District Court on the grounds that: (1) the questions presented are so unsubstantial as not to need further argument; and

(2) the decision of the District Court is plainly correct.

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STATEMENT OF THE CASE

This is a direct appeal from the judgment entered on January 28, 1976, by a district court of three judges specially constituted pursuant to 28 U.S.C. §2281 and §2284. The district court granted partial summary judgment to appellees, declared that Sections 756, 757, 770, 772, 773, 774, and 775 of the Judiciary Law of the State of New York were unconstitutional on their face, and enjoined the operation of said statutes against appellees and members of their class.

Each of the named appellees were indigent debtors who were imprisoned or threatened with incarceration pursuant to New York Judiciary Laws because of their noncompliance with a post-judgment discovery subpoena and their inability to pay a contempt fine. Each appellee initially had a default money judgment taken against him or her [1] by a judgment creditor. In an effort to enforce the judgment, the judgment creditors issued subpoenas to compel the disclosure of assets pursuant to New York Civil Procedure Law and Rules 5223. The subpoenas required appellees to appear before a notary public for the taking of a desposition regarding all matters relevant to the satisfaction of the judgment and to produce certain books and records for examination. When appellees failed to comply with the judgment creditor's subpoena, the judgment creditor instituted civil contempt proceedings against appellees pursuant to New York Civil Procedure Law and Rules 5251 and New York Judiciary Law Section 753(2)(5).

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[1] Appellee Rabasco is the only exception to this pattern. Because of his indigency, he was unable to comply with a court order of support issued by appellant Grady, and the civil contempt process was instituted by his wife to enforce the support order.

The creditors instituted the civil contempt proceedings by the issuance of a show cause order by appellants Aldrich or Juidice pursuant to New York Judiciary Law Section 757(1) requiring the appellees to demonstrate why he or she should not be adjudged in contempt of court for failure to obey the creditor's subpoena. Judiciary Law Section 757(1) provides that the court shall "Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. . .". Judiciary Law Section 757(1) does not require that the notice inform individuals that failure to appear may result in contempt of court, a fine paid to the creditors that may exceed the underlying debt, and imprisonment. The appellants Aldrich and Juidice issued the show cause order based upon the affidavit of service of the subpoena and the affirmation of the creditor's attorney indicating that the appellee did not appear in compliance with the subpoena.

In each case when appellees failed to appear,[2] they were adjudged in contempt of court by appellants Aldrich or Juidice[3] pursuant to Judiciary Law Sections 770 and 772, and were ordered to pay a fine of up to $250 plus court costs within a specified period of time or face incarceration until the fine was paid. Judiciary Law §773 provides that a fine of up to $250

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[2] Failure to appear may be caused by many factors. A 1973 study of the New York Civil Contempt procedures revealed that more than one-half of the individuals failed to appear at the show cause hearing because they did not understand the meaning of the show cause order. The study indicated that "Few if any of the persons interviewed understood why they had been fined, and none stated they knew how to prevent it." Alderman, Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York, 24 Syracuse Law Review 1217, 1239 (1973).

[3] Appellee Rabasco was the only person to appear at the show cause hearing. At that time, he requested that appellant Grady assign an attorney to represent him as he did not have sufficient funds to retain a lawyer. This request was denied as the Judiciary Law makes no provision for the assignment of counsel. Appellants' (continued)

plus costs may be imposed with no proof of loss or injury and that the fine is to be paid to the judgment creditor.[4] Pursuant to Judiciary Law Sections 770 and 772, appellees were adjudged in contempt of court and subjected to the threat of incarceration without an actual hearing and without being advised of their right to counsel and to assigned counsel if indigent. This order of contempt was the first notice appellees received regarding the possibility of incarceration. All appellees failed to pay the fine due to their indigence.

When appellees failed to pay the fine within the specified period of time, appellants Aldrich or Juidice issued an ex parte commitment order pursuant to Judiciary Law §756. The court issued this order based upon an affidavit of the creditor's attorney stating that the appellee had not paid the full amount of the fine and an affidavit of a process server stating that appellee had been served with the contempt order. Pursuant to Judiciary Law §756 entitled "Issue of warrant without notice", appellees were incarcerated or threatened with incarceration without an actual hearing and without being advised of their right to counsel and to assigned counsel if indigent.

Pursuant to Judiciary Law §774, appellees were incarcerated until they paid the contempt fine plus costs and sheriff

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[3] (cont.) argument that appellee Rabasco retained Mid-Hudson Valley Legal Services Project is spurious. Mid-Hudson Valley Legal Services Project was retained to assist him in receiving assigned counsel and not to defend the contempt proceeding.

[4] Thus while the underlying judgment in appellee Ward's case was $146.84, he was fined $250 plus $20 for costs and expenses. The judgment creditor is entitled to keep the entire $250 pursuant to Judiciary Law §773.

fees. Judiciary Law §774 provides for incarceration with no inquiry into the ability of the contemnor to pay the fine. Judiciary Law §774 provides for incarceration for a period of up to ninety days before a court reviews the proceedings.

On October 30, 1974, appellees Vail, Ward, and McNair filed a complaint seeking to have the court declare invalid and enjoin the enforcement of Judiciary Law Sections 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 on the grounds that appellants' use and enforcement of the statutes violated appellees' rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellee Ward sought a temporary restraining order and preliminary injunction against the enforcement of the above mentioned sections of the Judiciary Law. On November 6, 1974 a temporary restraining order was issued restraining appellants from arresting and imprisoning appellee Ward. Appellees Hurry, Nameth, Humes, Harvard, Rabasco, Russell, Thorpe, and Harrell were subsequently intervened. Temporary restraining orders were subsequently issued on January 2, 1975 restraining appellants from arresting or imprisoning appellee Hurry, and on January 28, 1975 restraining appellants from arresting or imprisoning appellees Nameth, Humes, Harvard, and Rabasco.

On January 28, 1976, a three judge district court declared invalid and enjoined the enforcement of Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York on the following grounds:

(1) Sections 756, 757, 770, 773, and 774 permit an adjudication of contempt and order of imprisonment without an actual hearing;

(2) Section 757 does not provide for adequate notice or warning of the consequences of failure to appear at the show cause hearing;

(3) Sections 756, 770, 772, and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent, and

(4) the fines and incarceration permitted under Sections 756, 770, 773, and 774 are punitive.

The court also denied appellants' motion for a stay. On February 12, 1976, Justice Thurgood Marshall granted appellants' application for a stay of judgment. On March 1, 1976, Justice Marshall denied appellees' application for modification of the stay.

I. ARGUMENT

THE THREE JUDGE COURT CORRECTLY DECIDED NOT TO ABSTAIN FROM DECIDING THE ISSUES RAISED IN THIS ACTION.

A. Introduction

28 U.S.C. §2283 permits federal courts to enjoin state court proceedings if the injunction is "expressly authorized by an Act of Congress." Actions under 42 U.S.C. §1983 fall within the expressly authorized section of 28 U.S.C. §2283. Mitchum v. Foster, 407 U.S. 225, 243 (1972). In Mitchum, supra, this court noted at 242 that

> "The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial. . .' ".

The three judge court properly held that the abstention doctrines in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S. Ct. 1200 (1975) did not apply to civil contempt proceedings because (1) the civil contempt statutes are unrelated to criminal statutes and do not play any part in the enforcement of state criminal laws, and (2) the deficiencies in the civil contempt procedures prevent individuals from having an adequate opportunity to raise the federal issues in state court.

B. Huffman v. Pursue Ltd., supra, Does Not Mandate Abstention Because the New York Civil Contempt Statutes are Civil Proceedings.

Appellees contend that principles of equity, comity, and federalism permit an injunction of the [illegible] court civil proceedings in the instant action. Huffman, supra, presents no bar to an injunction of the state court proceedings in this case. In Huffman, supra, the Supreme Court reiterated the philosophy expressed in Younger v. Harris, 401 U.S. 42, 43 (1971) that ". . . courts of equity should not set . . . to restrain a criminal prosecution." This court in Huffman, supra, noted that

> "Younger . . . rests upon the traditional reluctance of courts of equity. . . to interfere with a criminal prosecution. Strictly speaking, this element of Younger is not available to mandate federal restraint in civil cases." Huffman v. Pursue Ltd., 95 S. Ct. 1200, 1208 (1975).

The district court correctly decided that this case was not barred by Younger because the statutes in question are civil. The district court noted at 6a[5]

> "The challenged statutory scheme is designed to facilitate a creditor's collection of a judgment debt. The civil contempt proceedings are initiated by private parties to enforce compliance with subpoenas issued by private attorneys. They are not related to New York's Criminal statutes; nor do they plan any part in the enforcement of the state's criminal laws. Moreover, the challenged proceedings are defined as civil by the Judiciary law."

Because these proceedings are civil, federal restraint in this action is not warranted.

Appellants contend that civil contempt in New York should be viewed as a criminal proceeding because New York courts have characterized the proceedings as quasi-criminal. Appellants cite two lower New York court opinions to support their theory.[6] A closer examination of New York Court of Appeals cases indicates that New York courts have historically and consistently viewed civil contempt proceedings as civil proceedings and have distinguished them very clearly from criminal contempt. In People v. Oyer, 101 N.Y. 245, 247 (1886), the New York Court of Appeals noted that the distinction between civil and criminal contempt is "exhaustive and clear". While civil contempt involves the "vindication of private rights", criminal contempt involves:

> ". . . a violation of the rights of the public as represented by their constituted legal tribunals and a punishment; for the wrong in the interest of public justice, and not in the interest of an individual litigant." People v. Oyer, 101 N.Y. 245, 248 (1886)

See also King v. Barnes, 113 N.Y. 476 (1889).

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5 Page numbers followed by the letter 'a' refer to the appendix in appellant's Jurisdictional Statement.

6 A reading of Matter of Carlson v. Podeyn, 12 A.D. 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961) reveals that the case does not characterize civil contempt proceedings as criminal. The court simply notes at 810-811

> "As punishment for contempt may involve not only loss of property but of liberty as well, it is a reasonable requirement that the mandate alleged to be violated should be clearly expressed, and when applied to the act complained of, it should appear with reasonable certainty that it had been violated."

The appellants also contend that the civil contempt proceedings are ". . . akin to a criminal prosecution for purposes of Huffman . . ." because the offender can be fined or jailed. However, this court has recently clearly stated that the possibility of incarceration does not convert a civil proceeding into one that is criminal. In Middendorf v. Henry, ____ U.S. ____, 44 L.W. 4401, 4405 (Mar. 23, 1976), this court noted

> ". . .the fact that a proceeding will result in loss of liberty does not ipso facto mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment. Nor does the fact that confinement will be imposed in the first instance as a result of that proceeding make it a 'criminal prosecution'."

The possibility of incarceration was also not the major factor viewed by this court in Huffman, supra, in the application of the Younger doctrine in that case. This court decided that the proceeding was more "akin to a criminal prosecution than are most civil cases because

> "The state is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the state's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." Huffman supra at 1208.

In Huffman, supra, a sheriff and a prosecuting attorney instituted a nuisance proceeding pursuant to the Ohio public nuisance statute in an effort to close a movie theatre specializing in pornographic

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6 (cont.) While the court in Dwyer v. Town of Oyster Bay, 28 Misc. 2d 952, 217 N.Y.S. 2d 392 (Sup. Ct., Nassau Co. 1961) characterizes contempt of court as a "semi-criminal proceeding", the court in that case appears to be dealing with a criminal contempt proceeding rather than a civil contempt proceeding.

films. The determination of obscenity in the proceeding was based upon the definition of obscenity contained in Ohio criminal statutes. In the instant case, private parties initiated civil contempt proceedings to enforce compliance with subpoenas issued by private parties. The state clearly does not institute the proceedings and is not a party to the proceedings. The civil contempt procedures are not utilized by the state to regulate behavior that is also regulated by criminal statutes.

Appellants argue that abstention is warranted even if the proceedings are viewed as civil and cite Schmidt v. Lessard, 421 U.S. 957 (1975) in support of their contention. In that case a three judge court issued an injunction against mental commitment proceedings which the court characterized as an aspect of the police power of the state. The district court noted at 349 F. Supp. 1078, 1084 (E.D. Wis. 1972),

> "Additionally, it is said that the individual may be deprived of liberty under the police power because of society's need to protect itself against the potential dangerous acts of persons who, because of mental illness, are likely to act irrationally."

Appellees contend that in Schmidt, supra this court did not extend Younger to all civil proceedings. This court simply remanded the case to the three judge court "...for further consideration in light of Huffman...". This court did not reverse in light of Huffman. Appellees further maintain that Schmidt, supra is distinguishable from the instant case because while civil commitment procedures may be an aspect of the state's police power and the need to regulate conduct, civil contempt procedures are in no way an aspect of police power. Because New York civil contempt proceedings are civil, injunctive relief was proper.

C. Because the Procedural Deficiencies in the Civil Contempt Statutes Prevent Individuals From Having an Adequate Opportunity to Raise the Federal Issues in State Court, Huffman v. Pursue Ltd., supra, Does Not Mandate Abstention.

In Younger v. Harris, 401 U.S. 37, 47 (1971) this court stated that injunctions against criminal prosecutions may be proper if the threat to the individual's federally protected rights "...cannot be eliminated by his defense against a single criminal prosecution." In Huffman, supra, this principle was reiterated.

The three judge court correctly decided that the procedural infirmaties in the civil contempt statutes prevented appellees from having an adequate opportunity to raise the federal issues in state court. Because the civil contempt statutes permit incarceration without a prior hearing, most appellees were incarcerated and deprived of their federally protected rights before they could raise the federal issues in state court. The three judge court properly relied upon this court's decision in Gerstein v. Pugh, 420 U.S. 103 (1975) in finding that an injunction directed against procedural deficiencies that prevent individuals from asserting their claims in state court is proper.[7]

D. Younger v. Harris Permits Injunctive Relief In This Case Because There is a Threat of Irreparable Injury From the Enforcement of Patently and Flagrantly Unconstitutional Statutes

In Younger v. Harris, 401 U.S. 37, 56 (1971), this court noted that a federal court may intervene in state court proceedings "...when there is a threat of irreparable injury both great and immediate. A threat of this nature might be shown if the

[7] The issue before the court was not as appellants contend whether individuals must obey court orders as in Walker v. City of Birmingham, 388 U.S. 307 (1967) and Maness v. Meyers, 419 U.S. 449 (1975) but rather whether the manner in which New York State authorizes enforcement of its judgments through the civil contempt procedures complies with the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

state criminal statute in question were patently and flagrantly unconstitutional on its fact. . ." Huffman reiterated the language in Younger in stating that intervention is permitted where the challenged statute is:

> "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Huffman v. Pursue Ltd., 955 S. Ct. 1200, 1212 (1975).

As evidenced by the discussion infra, New York civil contempt statutes meet the above mentioned test of flagrant unconstitutionality. Other three judge courts in other districts have found similar statutes to be patently unconstitutional. See Desmond v. Hachey, 315 F. Supp. 328 (D. Maine S.D. 1970), Abbitt v. Bernier, 387 F. Supp. 57 (D. Conn.1974).

E. Abstention is Not Warranted in Dealing With Unambiguous State Statutes That Have Been Interpreted by State Courts in a Consistent Fashion Since Their Enactment in 1909.

The abstention doctrine is not to be utilized when ". . . no reasonable interpretation. . . would award or modify the federal constitutional question. . ." Procunier v. Martinez, 94 S. Ct. 1800, 07, (1974). The three judge court correctly decided that abstention is not warranted when the state statutes in question are clear, enacted in 1909, and when appellants have not disputed the way in which the statutes operate. See Harmon v. Forssenius, 380 U.S. 528, 534 (1965); Bugget v. Bullit, 377 U.S. 360 (1964); Wisconsin v. Constontineau, 400 U.S. 433, 439 (1971); Lindsey v. Normet, 405 U.S. 56, 62 (1972).

The present case is distinguishable from Carey v. Sugar, ___ U.S. ____, 44 L.W. 4416 (Mar. 23, 1976) in that the civil contempt statutes are not subject to a saving construction. The

statutes have been consistently interpreted to permit adjudication of contempt and incarceration without a hearing, Stewart v. Smith, 186 App. Div. 755, 175 N.Y.S. 468 (1919); Russell Homes Corp. v. Lynch, 17 N.Y.S. 2d 428, reversed on other grounds 20 N.Y.S. 2d 787 (1940); and to provide for inadequate notice or warning of the consequences of a failure to appear at the show cause hearing. The statutes further provide for no right to counsel and permit the imposition of punitive fines. Clark v. Biniger, 75 N.Y. 344 (1878); Geller v. Flamount Realty Corp., 260 N.Y. 346 (1932); Joseph Reidel Glassworks, Inc. v. Kurtz Inc., 287 N.Y. 636 (1941); Lavine v. 97 Realty Corp., 21 A.D. 2d 655 (1st Dept. 1964). The appellants set forth no cases which indicate that the statutes have been interpreted otherwise. Therefore, abstention was not warranted.

II. THE THREE JUDGE COURT CORRECTLY DECIDED THAT ON FOUR GROUNDS THE JUDICIARY LAW SECTIONS 756, 757, 770, 772, 773, 774, AND 775 WERE UNCONSTITUTIONAL.

A. Judiciary Law Sections 756, 757, 770, 773, and 774 Permit An Adjudication of Contempt and Order of Imprisonment Without an Actual Hearing.

The three judge court found Sections 756, 757, 770, 773, and 774 violative of the due process clause of the Fourteenth Amendment because they authorize incarceration ". . . on the basis of a creditor's affidavit of service and an ex parte proceeding." (7a) The court held that "A finding of contempt can be properly made only upon a hearing with both parties present. The defect is not cured by providing a hearing within 90 days of incarceration." (7a-8a).

Appellants' argue that an individual may be incarcerated without appearing before a court. However, appellants' reliance upon Endicott Johnson Corp. v. Encyclopedia Press, Inc. 266 U.S.

285 (1924) and Blackmer v. United States, 284 U.S. 421 (1932) is misplaced.[8] Because the New York civil contempt statutes involve the fine and imprisonment of individuals for their failure to respond to subpoenas, the due process standards set forth in Endicott, supra, and Blackmer, supra, are inapplicable to this case. Endicott, involved the garnishment of a debtor's wages, his property, in satisfaction of the judgment. Blackmer, supra involved the fining of an individual after a hearing for noncompliance with a subpoena. Since it is elemental that the requirements of due process depend upon the potential loss an individual may be subjected to, more elaborate due process protections are required when an individual may be subjected to incarceration than when an individual is subject to a fine or taking of property. As stated in Cafeteria & Restaurant Workers Union Etc., v. McCloy, 367 U.S. 886, 895 (1961):

> "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

A hearing is clearly required before an individual may be incarcerated.

The district court properly relied upon Harris v. United States, 382 U.S. 162, 167 (1965) in analyzing the type of due process required before an individual may be subjected to incarceration. The court noted at 167 that "...a hearing and only a hearing will elicidate all the facts and assure a fair

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8 Appellants' reference to Blouin v. Dembitz, 484 F. 2d 488 (2d Cir. 1974) is also of questionable relevance. Blouin, supra dealt with the adequacy of the service of process in New York Family Court proceedings and did not deal with the propriety of incarceration without a hearing.

administration of justice." In McNeil v. Director, Patuxent Institution, 407 U.S. 245, 251 (1972) this court rejected the contention that an individual might be incarcerated by forfeiting an opportunity for hearing. The court stated:

> "For if confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt."

The district court also properly relied upon Desmond v. Hackey,[9] 315 F. Supp. 328 (D. Me. 1970) and In Re. Harris, 69 Cal. 2d 486, 446 P. 2d 148 (1968) in support of the decision that a hearing must occur before and not after incarceration.

B. Judiciary Law, Section 757 does not provide for adequate notice in warning of the consequences of failure to appear at the show cause hearing.

The three judge court found Judiciary Law Section 757 violative of the due process clause of the Fourteenth Amendment because the statute fails to require that the order to show cause inform individuals that failure to appear at the show cause hearing might result in imprisonment. The court held that:

> "...notice must be complete and clear, given the substantial deprivation of

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9 In Desmond, supra a three judge district court declared the Maine civil contempt statutes unconstitutional. Caplovitz, in his empirical study of debt collection practice, has noted similarities between the New York Procedure and the former law in Maine:

> "The tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison. It is not known whether any debtor in our sample went to jail because of his failure to appear at a supplementary proceeding, but this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences had occurred in his area." 2D. Caplovitz, Debtors In Default 12-2 (1971).

> of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment." (8a)

Appellees maintain that the district court correctly determined that clear notice is required before one can be subjected to incarceration. It is elemental that the requirements of due process depend upon the kind of deprivation that could result from a failure to respond. As stated in Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 313 (1950),

> "The Due Process Clause requires that deprivation of life, liberty or property... be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Appellants' contention that only a person under a disability is entitled to the kind of notice required by the district court is without authority. Covey v. Town of Somers, 351 U.S. 141 (1956) cited by appellants merely indicates that an incompetent is entitled to more notice than was required by Article VII A, Title 3, of the New York Tax Law. Covey, supra says nothing about the requirements of due process regarding competent individuals faced with incarceration.

Moreover, appellants' assertion that the district court improperly relied upon Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) is in error. The court in Lynch, supra held that notice of commitment hearings must include in part "...the date, time, and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof..." These procedures were required in Lynch, supra, because they are elemental aspects of procedural due process.

Likewise, notice of the consequences of nonappearance at a show cause hearing is a basic requirement of procedural due process.

C. Sections 756, 770, 772, and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent.

The three judge court found Judiciary Law Sections 756, 770, 772, and 774 violative of the due process clause of the Fourteenth Amendment because the statutes authorize incarceration without providing a right to counsel and assigned counsel if indigent. The district court found:

> "Moreover, the right to a hearing prior to imprisonment is ineffective without counsel. The debtor cannot be expected to understand, much less to present, the legal and factual defenses to a finding of contempt that might be raised. Surely, a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime." (8a)

The right to counsel is essential when an individual is threatened with incarceration and when an individual must defend him or herself against this loss of freedom in an adjudication of factual and legal issues.

It is clear that at no stage of New York civil contempt procedures is an individual informed of the right to the assistance of counsel and that counsel would be provided at public expense if indigent.

Despite appellants' assertion that persons faced with civil contempt for failure to pay support are to be advised of their right to counsel, a closer examination of the case cited by appellants, Rudd v. Rudd, 45 A.D. 2d 22 (4th Dept. 1974), reveals that the case does not deal with the civil contempt

procedures in Article 19 of the Judiciary Law. The case does deal with New York Family Court Act Sections 433, 454, and procedures utilized to enforce compliance with Family Court support orders. Pursuant to this Act, an individual must be advised of the right to counsel prior to a finding of contempt. Rudd, supra, simply held that assigned counsel must be provided in the Family Court proceedings. This construction of the statutes is confirmed by the legislature's express provision for advising individuals of their right to counsel and providing assigned counsel for indigents[10] in the analogous non-support situation in Family Court.[11] This construction is also confirmed by appellant Grandy's specific denial of assigned counsel to appellee Rabasco in a contempt proceeding involving alleged disobedience of a support order in Dutchess County Supreme Court.

Appellees maintain that their due process right to a meaningful opportunity to present a defense before incarceration includes the right to be represented by counsel and assigned counsel if indigent in this proceeding that might result in incarceration.

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10 See People ex rel. Amendola v. Jackson, 74 Misc. 2d 797, 346 N.Y.S. 2d 353, 359-60 (1973); G v. G., 74 Misc. 2d 516, 345 N.Y.S. 2d 361, 367 (1973).

11 New York Family Court Act, Article 4 Support Proceedings Section 433 Hearing

> Upon the return of the summons or when a respondent is brought before the court pursuant to a warrant, the court shall proceed to hear and determine the case. The respondent shall be informed of the contents of the petition, advised of his right to counsel, and shall be given opportunity to be heard and to present witnesses. . ." (emphasis added)

In Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), this court adopted the rule that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (emphasis added). In a concurring opinion, Chief Justice Burger stated at 40:

> ". . .cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter."

While Argersinger dealt with an individual's right to the assistance of counsel in criminal prosecutions, this court has recognized the right to counsel in non-criminal cases where there is the possibility of incarceration and a deprivation of personal liberty. The Supreme Court has repeatedly found a right to the assistance of counsel when an individual's freedom is in jeopardy and has rejected the civil/criminal distinction in determining when this right attaches. See Specht v. Patterson, 386 U.S. 605 (1967) (right to counsel in commitment proceedings in Sex Offenders Act); Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973) (right to counsel in certain circumstances in probation revocation hearings).

Many state courts have also recognized that the right to counsel extends to civil proceedings where individual liberty and other fundamental rights are placed in jeopardy. State courts have found a right to counsel in cases involving civil commitment for mental disability,[12] civil commitment as a drug addict, [13]

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12 State v. Collman 497 P. 2d 1233 (Or. App. 1972); In re Popp, 62 Ohio 2d 54 (1972).

13 Thompson v. Morrow, 57 Misc. 2d 932, 293 N.Y.S. 2d 974 (Sup. Ct. Sullivan Co., 1968).

involuntary termination of parental rights,[14] and contempt proceedings regarding alleged violations of support orders[15]. As stated in Otton v. Zaborac, 525 P. 2d 737, 39-40 (Alaska Sup. Ct. 1974):

> "The potential deprivation of liberty in non-support contempt proceedings is as serious a matter as the restraint of liberty possible in criminal, juvenile, and criminal contempt proceedings. Therefore, we hold that in the case before us due process of law requires the assistance of counsel. . .And of course, this right to counsel would be of little avail if it were not afforded to those defendants unable to pay a private attorney."

Regarding civil contempt proceedings, the Supreme Court in Cooke v. U.S., 267 U.S. 517 (1925) stated: "Due process of law, therefore, in the prosecution of contempt, except that committed in open court. . . includes the assistance of counsel". See In re Oliver, 333 U.S. 257, 275 (1948); Sodones v. Sodones, 314 N.E. 2d 906, 910 (Mass. Sup. Jud. Ct. (1974).

Shortly after Argersinger, the court in United States v. Sun Kung Kang, 468 F. 2d 1368, 1369 (9th Cir. 1972), dealt specifically with the right to counsel question in civil contempt proceedings[16] and decided that due process encompassed such a right.

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14 Crist v. New Jersey Division of Youth and Family Services, 320 A. 2d 203 (Sup. Ct. N.J. 1972); Matter of Ella B., 30 N.Y. 2d 352, 334 N.Y.S. 2d 133 (1972); Chambers v. District Court of Dubuque County, 152 N.W. 2d 818 (Sup. Ct. Iowa 1967); State v. Jamison, 251 Ore. 114, 444 P. 2d 15 (Sup. Ct. Or. 1968).

15 Rudd v. Rudd, 45 A.D. 2d 22 (4th Dept. 1974); Commonwealth v. Hendrick, 283 A. 2d 722 (Pa. Super. 1971); Houle and Dubose, The Nonsupport Contempt Hearing: Constitutional & Statutory Requirements 19 N.H.B.J. 165, 171-172 (1973).

16 See U.S. v. Handler, 476 F. 2d 709 (2nd Cir. 1973).

> "We have concluded that an indigent witness is entitled to appointed counsel in (a civil contempt) proceeding. Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature."

In striking down California's mesne civil arrest procedures, in In re Harris, 69 Cal. 2d 486, 446 P. 2d 148. (Calif. Sup. Ct. 1968), Chief Justice Traynor noted the importance of the right to counsel in civil contempt proceedings.

> "An individual who is deprived of liberty by civil process is as much entitled to due process of law as a defendant who is deprived of his liberty because he is charged with crime. The mesne process of civil arrest without opportunity to be heard with the assistance of counsel is not due process." Harris at 152.

Traynor also noted the importance of providing assigned counsel to indigents.

> "The civil defendant cannot be expected to understand and to present the legal obligations that may be raised in testing the validity of the arrest order. . . An indigent defendant imprisoned under the process of mesne and arrest is confined in the same jail as the indigent felon undergoing trial who is entitled to appointed counsel under Gideon and the indigent misdemeanant who is serving a sentence imposed only after a trial at which he was entitled to appointed counsel under California's constitutional standards." Harris at 151-52.

In Tetro v. Tetro, 544 P. 2d 17 (Sup. Ct. Wash. 1975), the Supreme Court of Washington held that individuals have a right to assigned counsel in civil contempt cases and stated at 19:

> "We thus join the great majority of courts which have addressed the issue and hold that, wherever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation."

In Abbitt v. Bernier, 387 F. Supp. 57 (D. Conn. 1974) a three judge court in Connecticut found Connecticut's body execution statute unconstitutional. In discussing the type of legislation that would meet constitutional norms, the Court stated at 63 that "Appointed counsel. . . would likely be the right of every judgment debtor threatened with body execution." New York civil contempt procedures violate constitutional norms guaranteed by the due process clause of the Fifth and Fourteenth Amendments by subjecting individuals to the threat of incarceration without informing them of their right to counsel and assigned counsel if indigent.

The appellees' failure to appear at the show cause hearing does not constitute a waiver of their right to counsel and a foreclosure of their defense of indigency. The Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464, (1938) noted:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights."

The Court in Johnson then set forth the basic rule that the waiver of the right to counsel must be "an intentional relinquishment or abandonment of a known right or privilege". At no stage in the New York Judiciary Law Article 19 civil contempt proceedings were appellees advised of their right to counsel. Appellees did not intentionally relinquish their right to counsel because they were never informed that this right existed. Appellee Rabasco was specifically informed that the right to assigned counsel did not exist.

A waiver of the right to counsel cannot be presumed from the fact that appellees did not request to be furnished counsel. In Carnley v. Cochran, 369 U.S. 506, 515 (1962), the Supreme Court noted, ". . .where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request".

It is clear that the waiver principles of Johnson and Carnley apply to civil proceedings such as civil contempt. The Supreme Court stated in Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1937), a civil proceeding involving a rate increase, that "We do not presume acquiescence in the loss of fundamental rights".

In this case, we cannot presume that appellees' acquiesed in the loss of their fundamental right to representation by counsel.

D. The Fines and Incarceration Permitted Under Judiciary Law Sections 756, 770, 773, and 774 Are Punitive.

The three judge court correctly decided that

> ". . . the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive. Where compensation is intended and a fine imposed, it must be based on evidence of the complainant's actual loss. Section 773 requires the imposition of a fine up to $250 plus costs when the alleged contempt has not been shown to have resulted in any loss or injury to the creditor. If coercion is the purpose of the sanction, it can be justified only if the person has the ability to comply. The absence of the procedural safeguards of indictment and jury trial can be justified only by the conditional nature of the imprisonment and the contemnor's continued defiance. Section 756 permits the arrest and incarceration of a debtor, whether or not he is able to comply with the order by paying the fine. To the extent, therefore, that the fines and imprisonment contained in the Judiciary Law are punitive, they cannot be imposed in a civil contempt proceeding."

Judiciary Law Sections 756, 770, 773, and 774[17] violate the due process clause of the Fourteenth Amendment by authorizing the imposition of fines without proof of actual loss or injury on indigent debtors who have no ability to pay the fine.

The only allowable purposes for imposing a fine in a civil contempt proceeding are (1) to compensate the party injured by the contumacious conduct and (2) to coerce compliance with the court's mandate. Gompers v. Buck's Stove & Range Company, 221 U.S. 418 (1911); Shillitani v. United States, 382 U.S. 364 (1966). If the fine is neither compensatory nor coercive, then it is punitive and the imposition of such a fine is not permitted in a civil contempt proceeding. Sunbeam Corp. v. Golden Rule Appliance Co., 252 F. 2d 467 (2d Cir. 1958). Judiciary Law Section 773 authorizes the imposition of a punitive fine without proof of loss.

Judiciary Law Section 773 clearly provides that a fine of up to $250 in addition to costs, expenses and reasonable attorneys fees[18] shall be imposed without proof of actual loss.[19] Appellants' contention that the $250 maximum is not disproportionate to the contempt is irrelevant in due process terms. The fine must be previsely proportionate to the loss.

In Sunbeam Corp., supra, at 470 the Second Circuit clearly stated that awards in civil contempt cases are limited to

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17 While appellants contend that only Section 773 is involved in this issue, a closer examination of the statutes indicates that Sections 756, 770, and 774 all authorize use of the fining provision.

18 Benson Realty Corp. v. Walsh, 73 Misc. 2d 889, 343 N.Y.S. 2d 55 (Sup. Ct. New York Co. 1973).

19 In the case of appellee Ward, he was fined $250 plus $20 for costs and expenses even though the actions taken against Ward arose out of a judgment in the amount of $146.84.

compensatory amounts. "For its effect goes no further than to give to the plaintiff the profits derived by the defendant's wrongful conduct; it does not take from the defendant assets not related to its wrongful conduct." The court noted in National Drying Machinery Co. v. Ackoff, 245 F. 2d 192, 194 (3rd Cir. 1957), cert. den. 355 U.S. 832 (1957), "Whether an award in civil contempt be measured in terms of a plaintiff's loss or a defendant's profit, such an award, by very definition, must be an attempt to compensate plaintiff for the amount he is out-of-pocket or for what defendant by his wrong may be said to have diverted from the plaintiff or gained at plaintiff's expense."

The amount of the fine must be determined by considering allegations or proof of actual damage incurred as a result of the contumacious conduct. In Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 F. 774, 782 (2nd Cir. 1905), the court noted that because the fine in a civil contempt proceeding is imposed to indemnify the aggrieved party,

> "it should not exceed his actual loss incurred by the violation of the injunction, . . . it should not exceed in amount the loss and expenses established by the evidence before the court. Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture and in this sense it would be merely an arbitrary decision."

In United States v. United Mine Workers of America, 330 U.S. 258, 304 (1947) the court noted that a civil contempt fine "must of course be based upon evidence of complainant's actual loss." In Babee-Tenda Corp. v. Sharco Manufacturing Co., 156 F. Supp. 582, 588 (S.D.N.Y. 1957), the court stated that in civil contempt proceedings the "claim of actual damages must be established by competent evidence and the amount must not be arrived at by mere speculation or conjecture". New York Judiciary Law Section 773 violates the

due process clause of the Fourteenth Amendment by authorizing the imposition of a fine without regard to the creditor's actual loss.

Sections 756, 770, 773, and 774 also violate the due process clause because the fines are punitive rather than coercive. Pursuant to the cited sections, appellees were imprisoned until they performed the required act and paid the fine.[20] They could not end their sentence or the fine even if they did what they had previously refused to do, i.e., respond to the subpoena duces tecum. All appellees were incarcerated because they were unable to pay the contempt fines.[21] New York civil contempt procedures do not require a finding of ability to comply with the contempt order prior to incarceration.[22]

Civil contempt may not be used as a punitive measure. Incarceration is improper unless the court finds that the contemnor can comply with the court order. As the court stated in Gompers, supra at 442, civil contempt is "intended to be remedial by coercing the defendant to do what he had refused to do. . . He can end the sentence and discharge himself at any moment by doing what he had previously refused to do". In In Re Nevitt, 117 F.

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20 The fact that the Orders of Contempt issued by appellants Aldrich and Juidice do not require compliance with the subpoenas, but only payment of the fine, makes clear the degree to which this entire process is simply a collection mechanism employed against judgment-proof debtors.

21 It is significant to note that most of the plaintiffs who were incarcerated for their inability to pay the contempt fines were recipients of public assistance or unemployment insurance benefits. New York Social Welfare Law Sections 137 and 137a specifically exempt the public assistance grant and wages of a recipient of public assistance from levy, execution, income execution or installment payment order. New York Labor Law Article 18 Unemployment Insurance Section 595 states that "Benefits. . . shall be exempt from all claims of creditors and from levy, execution and attachment, or other remedy for receiving or collection of a debt. This exemption may not be waived."

22 This interpretation is confirmed by 6 Weinstein-Korn-Miller, New York Civil Practice §5251.02 cited by appellants. That treatise notes at 52-747 that the effect of Section 773 is as follows: "In effect, the judgment was converted into an order for payment without proof of the debtor's ability to pay."

448 (8th Cir. 1902) the court stated at 461 "but they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets."[23] In United States v. United Mine Workers of America, 330 U.S. 258, 304 (1947) it is stated that:

> "a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

In California the court must make a finding that the individual is able to comply with the contempt order before committing the individual. In Noortnoek v. Superior Court, 269 Cal. App. 2d 600, 609, 75 Cal. Rptr. 61, 67 (1969), the court stated:

> "In order to support an indefinite commitment...there must be a finding, based upon evidence, that the contemnor has the present ability...proof that (contemnor) had the ability to pay reasonable support, month by month, is not proof that (he) is now able to pay a lump sum of 4,000."

In Yoder v. County of Cumberland, 278 A 2d 379, 390 (Me. Sup. Ct. 1971) the Maine Supreme Court held that the summary incarceration of a debtor without a hearing violated the due process clause. The court noted, "Of course contempt by its very nature is inapplicable to one who is powerless to comply with the court order. It would be utilized against only that person who, being able to comply, contumaciously disobeys, or refuses to abide by, the court order."

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23 Inability to comply is a complete defense to a civil contempt order U.S. v. Thompson 319 F. 2d 665, 770-771 (2nd Cir. 1963).

The Supreme Court also has noted that it is absolutely improper to use the civil contempt process to force an individual to satisfy the contempt order by borrowing money from others. In Maggio v. Zeitz, 333 U.S. 56, 64 (1948) the court stated:

> No such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

See also United States v. Bryan, 339 U.S. 323 (1950).

In this case appellees have been deprived of the opportunity to demonstrate, before summary arrest, that compliance with the court order to pay default judgments and fines is impossible, i.e., that they are without funds to pay, and therefore that each arrest order "is an unqualified commitment to jail...and provides no way by which (they) may unlock the door of (their)prison by doing the thing which (they have) been ordered to do." Duell v. Duell, 85 App. D.C. 78, 178 F. 2d 683, 14 A 2d 560, 565 (1949). Appellants' contention that appellees never sought to excuse their failure to pay the fine or claim they were unable to pay the fine is spurious. The statutory scheme provides no opportunity for an individual to raise inability to comply with a contempt order as a defense to incarceration. Appellants' reliance upon National Coal Operators, Association v. Kleppe, ____ U.S. ____, 46 L. Ed. 2d 580 (1976) is also misplaced. In this case, unlike National, supra, the statutes provide no opportunity for a hearing after the contempt order and fine is imposed.

Judiciary Law Sections 756, 770, 773, and 774 violate the due process clause of the Fourteenth Amendment by imposing punitive fines on individuals who have no ability to pay these fines.

III. CLASS ACTION RELIEF WAS PROPER

The district court granted class action relief pursuant to Rule 23 of the Federal Rules of Civil Procedure because appellees satisfied all requirements of that rule. While appellants contend that class action relief was not proper, they fail to point to one section of Rule 23 that appellees did not meet.

Appellants contention that the class action relief was responsible for local sheriffs' decisions not to execute contempt fine orders in matrimonial non-support cases is simply not accurate. The effect of the three judge court order was to prevent the use of incarceration for nonpayment of support and alimony orders as well as for nonpayment of contempt orders by judgment debtors. The order had that effect not because of the class action relief but because incarceration for nonpayment of support and alimony orders in New York Domestic Relations Law and the New York Family Court Act is authorized by the Judiciary Law. When the statutes authorizing incarceration in the Judiciary Law were declared unconstitutional, there was no basis for use of incarceration in the support and alimony areas. New York Civil Rights Law Section 23 forbids civil arrest except as provided by statute.

IV. THE DISTRICT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO APPELLEES

Appellants maintain that the three judge court improperly granted partial summary judgment to appellees.

Appellees maintain that both the grant of partial summary judgment and the procedures utilized by the three judge court in making the decision were proper.

The summary judgment procedure described in the Federal Rules of Civil Procedure Rule 56 "...is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. 6 Moore's Federal Practice Section 56.01(3) at 56-15 (1975). Justice Cardozo noted that:

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. "Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110 (1926)."

The three judge court granted partial summary judgment because there were no geniune issues as to any material fact. Appellants appear to concede at page 17 of their Jurisdictional Statement that at least some of the appellees were indigent. The amount of fines could not be an issue of material fact as they are prescribed by Judiciary Law Section 773. Appellants fail to set forth any other material facts which might be in issue.

Appellants also contend that the court erred in granting summary judgment sua sponte. Appellees maintain that there is clear authority for such action. In Briscoe v. Campagnie Nationale Air France, 290 F. Supp. 863, 867 (S.D.N.Y. 1968), the court noted:

> "No motion has been made by Air France for summary judgment but it is evident that such a judgment should be entered and the court has authority to direct entry of such judgment even though there is no motion. 6 Moore's Federal Practice (2d ed.) 2241-46.

In Sibley Memorial Hospital v. Wilson, 488 F. 2d 1338, 1343-44 (D.C.C. 1973), the court stated, "Trial judges are not, of course, without the power to enter summary judgment sua sponte." See also White v. Flemming, 374 F. Supp. 267 (E.D. Wis. 1974); Federal Deposit Insurance Corporation v. Sumner Financial Corporation, 376 F. Supp. 772 (M.D.Fl. 1974).

V. THE DISTRICT COURT PROPERLY ENJOINED THE OPERATION OF THE STATUTES IN QUESTION AGAINST "ALL PERSONS WHO HAVE BEEN OR ARE PRESENTLY SUBJECT TO CIVIL CONTEMPT PROCEEDINGS

The district court correctly determined that the injunction should apply to "all persons who have been or are presently subject to civil contempt proceedings". It is clear that in civil and criminal cases[24] retroactivity of decisions must be based upon the following factors: (1) purpose to be served by the new standards, (2) the extent of the reliance by public officials on the old standards, and (3) effect on the administration of justice of a retroactive application of the new standards. Daniel v. Louisiana, 420 U.S. 31 (1975).

Applying these factors, the purpose to be served by the new standards is insure the reliability of a fact-finding process that may result in the incarceration of individuals. This court has held that Gideon v. Wainwright, 372 U.S. 335 (1963) is retroactive because the presence of counsel is essential to safeguard the reliability of the fact-finding process. Burgett v. State of Texas, 389 U.S. 109, 114(1967); Kitchens v. Smith, 401 U.S. 847 (1971). Similarly, the three judge court's decision that the New York civil contempt procedures are

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24 The same general principles of retroactivity apply to civil and criminal litigation. Linkletter v. Walker, 381 U.S. 618 (1965).

unconstitutional in part because of the denial of the right to counsel mandates retroactive application of the decision.

While officials have relied upon the old standards, retroactive application will not have an undue burden on the administration of justice. Contempt orders obtained under the Judiciary Law will simply be unenforceable and new procedures that are consistent with elemental due process requirements will be required before contempt orders can be enforced. The administration of justice will be served by the district court order.

V. CONCLUSION

WHEREFORE, appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument and that the three judge court's decision was correct. Appellees respectfully move the Court to affirm the judgment entered in the case by the Three Judge District Court for the Southern District of New York.

Respectfully submitted,

DATED: Poughkeepsie, N.Y.
April 27, 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1397

JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, JR., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinions Below

1. The opinion of the District Court, convening the three-judge court. 387 F. Supp. 630 (S.D.N.Y. January 13, 1975) (101a).*

2. The opinion (and order) of the three-judge District Court declaring Sections 756, 757, 770, 772, 773, 774 and

* Numbers in parentheses refer to Appendix (a) or Appendix to Jurisdictional Statement (J.S. a).

775 of Article 19 of the New York Judiciary Law unconstitutional and enjoining their operation is reported below at 406 F. Supp. 951 (S.D.N.Y., January 7, 1976) (J.S. 1a).

3. The separate opinion (MacMahon, D.J.) granting class action status is unreported. It is reproduced in the Jurisdictional Statement (J.S. 17a).

4. Probable jurisdiction noted and *forma pauperis* relief granted appellees. —— U.S. ——, 44 U.S.L.W. 3737 (June 21, 1976).

Jurisdiction

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The modified judgment or order appealed from was entered January 28, 1976 (J.S. 19a). The defendants appealing filed their notice of appeal February 6, 1976 (J.S. 21a).

Questions Presented

1. Did the District Court err in failing to abstain in view of the pendency of state court proceedings in which the substantive issues raised herein could have been resolved?

2. Was the District Court in error in ruling on the constitutionality of state statutes which were capable of a constitutional interpretation by the state court?

3. Did the District Court violate the constitutional requirements of "full faith and credit" and *res judicata* by invalidating state court orders rendered in proceeding between the private defendants below and appellees?

4. Are the several sections of New York's Judiciary Law at bar unconstitutional *on their face* because

(a) they allow an adjudication of contempt without an actual hearing (based on default in appearance of order to show cause).

(b) § 757 does not require specific notice of the possible results of non-appearance at the show cause hearing other than that the person served will be in contempt?

(c) §§ 756, 770, 772 and 774 do not require informing the alleged offender of his right to counsel (or assigned counsel if indigent)?

(d) the fine and alternatively incarceration permitted under §§ 756, 770, 773 and 774 are deemed punitive and is paid to the judgment-creditor?

5. Was this a proper class action?

6. Did the District Court err in granting partial summary judgment when the only motions before it were for a preliminary injunction and a cross motion to dismiss?

7. Did the District Court err in giving retroactive application to its order?

Statutes Involved

New York Judiciary Law, Article 19. The specific portions of Article 19 invalidated are set out in the Appendix to this brief.

Briefly summarized the statutes dealing with contempt arising from the failure to comply with an order of the court:

(1) § 756 provides that where the offender has failed to pay a specific sum of money an *ex parte* order may issue committing the person until the money is paid or he is discharged according to law. (This was provided for in the fining order issued here after the respondents failed to appear on the order to show cause.)

(2) § 757 provides for either an order to show cause or a warrant of attachment to bring the case before the (state) court. (The latter, subd. 2, would result in arrest before any adjudication. It was not used herein.)

(3) § 770 provides for a final order if the accused has committed the offense and must be punished by fine or imprisonment. (A special procedure is provided for Domestic Relations Law § 245 and other matrimonial orders for payment of alimony or counsel fees.)

(4) § 772 simply provides for decision of the order to show cause and punishment as in § 770.

(5) § 773 provides for a fine to indemnify the aggrieved party. If actual loss is not shown, a fine must be imposed not exceeding costs and expenses plus $250.

(6) § 774 provides a limit to imprisonment. For a fine of under $250, the limit is three months; if more, six months. There is also a provision that the offender must be brought before the court within 90 days, if imprisoned for an indeterminate term or for more than three months. Notice is provided.

(7) § 775 provides that where the offender cannot endure the punishment of imprisonment or pay the money or perform the act, the court may discharge the offender from custody.

Statement of the Case

The District Court ultimately granted partial summary judgment declaring seven cited sections of New York's Judiciary Law unconstitutional on their face on the basis of an allegedly "typical" case; that of the named plaintiff, Harry Vail. According to the District Court's statement of the facts which, in turn, was based solely on affidavits submitted by appellees and their attorney, submitted in support of their motion for a preliminary injunction,

Vail suffered a default judgment ($534.36) in the City Court of Poughkeepsie, Dutchess County, New York. He was then served with a subpoena by the attorney for the judgment-creditor to appear for a deposition relative to an examination of his assets which might be available to satisfy the judgment. Vail did not appear.*

Thereafter, on the basis of the default and in accordance with New York law, upon application of the attorney for the judgment-creditor, Vail was ordered to appear to show cause why he should not be punished for contempt for his failure to appear. Appellant Judge Juidice signed this order to show cause, which was served upon Vail.

When Vail disregarded this order and once again failed to appear in court, Judge Juidice signed another order imposing a fine ($250 plus $20 costs), payable to the judgment-creditor (Public Loan Company) in reduction of the judgment (although not reproduced the fining order was of the installment payment nature. CPLR [New York Civil Practice Law and Rules] 5226. See appendix to plaintiffs' brief in District Court).** In Vail's case this occurred. He was released the next day upon payment of the fine.

Plaintiffs also alleged indigency. (Obviously if any judgment-debtor is indigent the examination in supplementary proceedings would be non-productive to the judg-

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* The subpoena pursuant to N.Y. Civil Procedure Law and Rules (CPLR) 5223 must state that: "failure to comply with the subpoena is punishable as a contempt of court," must be served at least 10 days before its return date (CPLR 5224) and upon any examination if the person subpoenaed does not understand the English language that "the judgment-creditor shall, at his own expense, provide a translation of all questions and answers."

** The form of the order was different from the case of Patrick Ward, another appellee whose order of contempt was annexed to the original papers asking a temporary restraining order in the District Court. Those provided if the fine was not paid within 30 days, upon proof of due service, an order might issue *ex parte* directing the Sheriff to take Ward into custody. This was stayed (50a).

ment-creditor. Furthermore, if such fact is pointed out to the court, such debtors as appellees would be released from any civil imprisonment.) It should be noted that there were numerous other situations before the Court below, some of which did not involve even alleged indigency--i.e., the appellees could pay the fine.* Indeed, for the most part, they paid the fine.

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* Briefly, the contentions were and this is not to concede the absence of any factual issues, as the defendants-appellants were moving to dismiss and plaintiffs never established these allegations in state court to oppose contempt. Thus appellant Judges could have no basis to controvert these claims, although they have never been properly established in any evidentiary hearing in a court, state or federal.

(1) Patrick Ward owes a state court judgment of $146.84. He failed to appear at a subpoena examination, in response to an order to show cause, or pay a fine imposed. He was subject to commitment for his failure. (20a-24a)

(2) Richard McNair owes a judgment of $362.42. He failed to appear at a subpoena examination, respond to an order to show cause, or pay a fine ($293.75) imposed. He was jailed for five hours, paid the fine on money from "rent" and money his wife borrowed from her credit union. It is significant that the judgment was for services rendered to plaintiff McNair's wife. While he contends he is "indigent", he had the resources to pay the fine ["rent" money and borrowing], a substantial portion of the judgment. (Compl. ¶ 74, 28a)

Thereafter another plaintiff was added in this action:

(3) James Hurry owes a judgment of $90.43. He, too, ignored all supplementary proceedings to examine him as to his assets and the order to show cause to punish him for contempt. He ignored the fining order. Warned by the Sheriff that he would be committed January 2, 1975 he intervened in the instant action. While he claimed many debts, he did not claim indigency and contended (¶ 14, aff., Dec. 31, 1974) that he "refuses to pay the fine because he maintains that defendant Redl never properly repaired his car." Thus failure to pay was not because of any indigency.

Then four more plaintiffs were permitted to intervene or moved to do same in the action:

(4) Leslie Nameth owes a judgment of $69.82. His situation is quite similar to Hurry. He ignored all legal process

(footnote continued on following page)

The appellees are basically a class of judgment-debtors who have never presented any claims on the merits or on procedure to appellant judicial officers, yet were allowed to sue the latter for violation of their alleged constitutional rights.

(footnote continued from preceding page)

and notices. He, too, asserted that he "refused to pay the fine because he maintains that defendant Redl did not give him a proper credit on the towing charges . . ." (¶ 11, 56a). This failure to pay was not because of any indigency.

(5) McKinley Humes owes a judgment of $233.84. He, too, ignored all legal process and notices. He faced the *danger* of imprisonment. He had never appeared in state court. (58a-63a)

(6) Joanne Harvard owes a judgment of $413.40. She ignored all legal process and notices, was arrested and committed for non-payment, at which time she promptly paid the fine, allegedly through a "loan" from her mother. She asserted she has been threatened with commitment again. She asserts she has no money to make installment payments on her outstanding judgment. However, no legal proceedings in state court were ever instituted. (64a-68a)

(7) Joseph Rabasco was under a court order to make support and mortgage payments to his wife. He defaulted, allegedly after losing his job, and stated he was on unemployment insurance. His wife sought an order of contempt. Of all the plaintiffs below, Rabasco alone appeared in court on the hearing. He allegedly asked Justice Grady, presiding there, to assign a lawyer. While it was asserted Justice Grady "refused", the Justice did adjourn the case from January 6, 1975 to an unspecified date so that Mr. Rabasco could retain a lawyer. It was stated private counsel wanted a $500 to $1,200 retainer. Mr. Rabasco did retain Mid-Hudson Valley Legal Services as his attorney. Within two days it had drawn up the affidavit for this action. Thus to claim Mr. Rabasco was refused counsel is absurd. His hearing was adjourned and he retained an attorney.

(8) Richard Russell owes a judgment of $932.11 on a lease he broke. The usual defaults occurred. On January 30, 1975, pursuant to a commitment order of *March 8, 1974*, he was arrested and committed for non-payment of his fine. The *same day*, he paid his fine ($289.95 allegedly on money his father lent him). (69a-78a)

(footnote continued on following page)

Prior Proceedings

On institution of the action and thereafter, the appellees obtained temporary restraining orders in the district court enforceable against the appellant Judges against the commitment of appellees to jail based on the state court orders of contempt, thereby circumventing the state court proceedings. District Judge Cannella ordered the convening of a three-judge court, 387 F. Supp. 630 (S.D.N.Y. 1975).

The three-judge court, after hearing the motion for a preliminary injunction and the state defendants' motion to dismiss, declared the several sections of New York Judiciary Law unconstitutional and enjoined further application. In a separate memorandum and order District Judge MacMahon granted class action status (J.S. 17a). On appellants' order to show cause to resettle the order and for a stay (166a), the court changed the order, making the declaration of unconstitutionality retroactive and stating that the order was for "partial summary judgment", and failing to accord a stay to the appellants (J.S. 19a).

Appellants then applied to Mr. Justice Thurgood Marshall for a stay of judgment pending an appeal. Justice Marshall granted the stay on February 12, 1976 (J.S. 23a).

(footnote continued from preceding page)

(9) Helen Thorpe owed a judgment of $112.75 to Redl, an auto shop. The usual defaults occurred. She was arrested and committed, for *three hours*, when her nephew allegedly loaned her $139.63 and her fine was paid. (137a-140a)

(10) Robert H. Harrel and his wife Evella owes a judgment for medical services. While Mr. Harrel is purportedly to have intervened, there was no indication he has ever retained the attorneys herein. He had left home before the motion for intervention. While he was committed two times, for a total of *six hours*, each time his mother, brother or sister lent him the money to pay the fine and he was immediately released. As Mrs. Harrel did not know his whereabouts, we doubt if this was a real case or controversy. (141a-147a)

It should be noted that contradictory affidavits were filed as to Russell, Thorpe, and Harrel (79a-82a) and Harvard (82a-100a)

An application by appellees for modification of the stay was denied by Justice Marshall March 1, 1976.

The appellants filed their notice of appeal February 6, 1976 (J.S. 21a), docketed the appeal with this Court by filing a Jurisdictional Statement April 2, 1976, and probable jurisdiction was noted by this Court June 21, 1976.

Summary of Argument

1. The District Court, in declaring the several sections of the New York Judiciary Law unconstitutional *on their face*, failed to observe applicable principles of equity, comity and federalism. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). The administration of the contempt power is at the heart of the operation of a judicial system. To abolish civil contempt in New York was a flagrant usurpation of power by the court below. State court orders cannot be reviewed by the district court in the guise of a civil rights action.

In the alternative the Court violated the U.S. Constitution, Art. 4, § 1 ("full faith and credit") and failed to give res judicata effect to completed contempt proceedings in state court. *Mertes* v. *Mertes*, 350 F.Supp. 472, affd. 411 U.S. 961 (1973).

The District Court's conclusion that New York law was clear also is subject to some question. *Walker* v. *Walker*, 51 AD 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976). Procedures or safeguards on imposition of civil contempt punishment are in a state of flux with significant decisions not considered below and the state courts, basically the appellants herein, should be accorded the opportunity to interpret or apply their own laws. *England* v. *Louisiana State Board*, 375 U.S. 411 (1964); *Carey* v. *Sugar*, —— U.S. ——, 47 L. Ed. 2d 587 (1976).

2. New York's civil contempt procedure is constitutional. It gives the respondent in a contempt proceeding adequate notice of the charge, an opportunity to be heard through counsel and grants a judge the power within his discretion to impose a sanction for the offense, if proven. *In re Oliver,* 333 U.S. 257 (1948); *Agur* v. *Wilson,* 498 F. 2d 961 (2d Cir. 1974), *cert. denied* 419 U.S. 1072.

It does not state a cause of action to claim defendants deprived plaintiffs of their civil rights by instituting contempt proceedings in state court.

Even if the facts uniformly supported the District Court's order, New York's Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 are not unconstitutional on their face. It is not a violation of due process that a statute permits, but does not require, (1) adjudication of contempt upon default without an actual hearing, *Blackmer* v. *United States,* 284 U.S. 421 (1932), (2) fails to warn of fine or imprisonment as a punishment for civil contempt (3) does not provide specifically for assigned counsel for indigents, and (4) allows fines payable to the judgment-creditor without proof of actual damages.

3. It was not proper to grant class action relief to invalidate a law which applies to all civil contempts. The court below made utterly no distinction between indigents, persons with resources to pay the fines, those represented by counsel, and those who actually had contempt hearings.

4. The granting of partial summary judgment without a trial was tantamount to final relief herein. The District Court erred in this regard. It violated the law of its own Circuit. *Rhoads* v. *McFerran,* 517 F.2d 66 (2d Cir. 1975).

POINT I

The district court erred in not abstaining, both because of the existing state court proceeding and the unsettled nature of the state law. It also failed to give full faith and credit and res judicata effect to state court orders.

A. The district court overreached itself in passing judgment upon the several state court proceedings

The adjudication of civil contempts is a judicial function. If the contempt is committed in the state courts of New York, then it is for those courts to adjudicate *whether* a person is in contempt and whether any constitutional rights have been violated or what safeguards must be observed, subject to review by this Court. The appellants herein are state court judges who have been held to have violated appellee's "constitutional" rights because of their judicial decisions. Yet appellants, too, have sworn to uphold the Constitution, Art. VI § 2 and are as capable of protecting appellee's constitutional rights as federal judges. They certainly did not deny the defaulting respondents in their courts any constitutional rights. Indeed it is generally difficult to give any rights to someone who fails to appear, save the court assuring itself that there is jurisdiction over the defaulting party.

The very concept of a federal court assuming jurisdiction over state court judges and litigants to review state court orders strikes at the heart of the fundamental principles of equity, comity and federalism which underly our dual system of courts, i.e., state and federal. Even though 42 U.S.C. § 1983 may be an exception to the anti-injunction provisions of 28 U.S.C. § 2283, *Mitchum* v. *Foster,* 407 U.S. 225 (1972), a court must still always consider applicable principles of equity, federalism and comity, *Mitchum, id.* at 243-244 (Burger, C.J., conc.).

What due process attaches to a "civil" contempt proceeding is not a determination easy to make, as "civil" contempt is not easy to classify. The sanctions for such contempt are said to be coercive in nature; *United States* v. *United Mine Workers*, 330 U.S. 258, 303-04 (1947). This is in contradistinction to criminal contempt where the sanction is said to be "punitive", *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); see also *Katz* v. *Murtagh*, 28 N.Y. 2d 234, 239, 269 N.E. 2d 816, 818-19 (1971). Still the distinction of contempt by the "character and purpose", *Gompers, id.* at 441 of punishment has not always been successful, as this Court noted in *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324 (1904) at 329:

> "[i]t may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both".

And at 326, this Court clearly stated:

> "A contempt proceeding is *sui generis*. *It is criminal in its nature*, in that the party is charged with doing something forbidden, and, if found guilty is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action" (Emphasis supplied).

Regardless of whether "civil" contempt is civil or criminal for abstention pursuant to *Younger* v. *Harris*, 401 U.S. 37 (1971) or *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), the court below utterly failed to consider the setting of the process it enjoined. Contempt is a judicial process, instituted in a court, heard by a court and decided by a court. By preventing the appellants (and all state court judges) from performing their judicial functions, the district court failed to give proper weight to relevant considerations of federalism.

As said in *Huffman*, at 603-604:

> "Although Mr. Justice Holmes was confronted with a bill seeking an injunction against state executive officers, rather than against state judicial proceedings, we think that the relevant considerations of federalism are of no less weight in the latter setting. If anything, they counsel more heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principle.' *Cf. Steffel* v. *Thompson, supra*, at 462."

Simplistic labeling of contempts as civil or criminal, as in the opinion below (n. 14), is not helpful. While instituted by a private litigant, civil contempt in New York has been defined or called quasi-criminal or semi-criminal. *Matter of Carlson* v. *Podeyn*, 12 A D 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961); *Dwyer* v. *Town of Oyster Bay*, 28 Misc 2d 952, 217 N.Y.S. 2d 392 (Sup. Ct., Nassau Co., 1961) ("semi-criminal"). In other jurisdictions, even though the contempt is noted as quasi-criminal as it may result in fine or imprisonment, but this has not been held to alter its remedial character. *Cromaglass Corp.* v. *Ferm*, 500 F.2d 601 (3d Cir. 1974); *United States Steel Corp.* v. *United Mine Workers*, 393 F. Supp. 942 (W.D. Pa. 1975).

It is clear that even if a commitment involved here is denominated in law as civil or quasi-criminal, the principles enunciated in *Huffman* v. *Pursue, Ltd.*, should be applied here. See *Schmidt* v. *Lessard*, 421 U.S. 957 (1975), vacating and remanding *Lessard* v. *Schmidt*, 379 F. Supp. 1376 (E.D. Wisc. 1974).

The result reached below cannot be said to be induced by any arbitrary state court action. As a class the appellees never appeared in the state court before appellant judges, although served with notice in the order to show cause, to appear in the state court to explain why the appellees should not be punished for contempt. If appellees had wished to present any excuse or explanation for their failure to comply with the subpoena, see n. 8 to Opin. below (J.S. 15a) the hearing on the order to show cause was the place to do it as it was a matter of defense. Certainly the collateral attack in federal court was not warranted.

It was a flagrant breach of federalism to have held that state court judges violated the constitutional rights of appellees and all other respondents in New York civil contempt proceedings, past and present, who had never appeared in court. As stated in *Rizzo* v. *Goode,* —— U.S. ——, 46 L. Ed. 2d 561, 574-575 (1976), principles of federalism (and abstention) have not been limited to criminal proceedings, or even to the judicial branch of state government:

> "Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal prosecution itself."

There this court applied the principles to an executive branch of an agency of local government, namely the Philadelphia Police Department. There should be displayed more reluctance to interfere with ongoing state court proceedings particularly here where, as we have said, it was not the action of the state court judges which denied appellees any constitutional rights as the judges never

were presented with such objection. Action which these judges might have taken on an application by appellees, would be in their capacity as judges, who have the same constitutional obligations as the three-judge court below. See *Gras* v. *Stevens,* —— F. Supp. ——, (3 judge court, S.D.N.Y. 76 Civ. 9, May 10, 1976); *Mendez* v. *Heller,* 380 F. Supp. 985 (E.D.N.Y. 1974), affd. *sub nom. Roman* v. *Heller,* —— F. 2d —— (2d Cir. 1976) Slip op. 1841. Simply by signing an order to show cause, or the subsequent fining and commitment order, it can hardly be said these appellants deprived appellees of due process. If the judges committed error, the remedy was to appeal the order through the state court system to this Court. Federal courts do not sit to pass on the correctness of state court orders in these instances. *Murray* v. *Oswald,* 333 F. Supp. 490, 492 (S.D.N.Y. 1971).

Gerstein v. *Pugh,* 420 U.S. 103, 108, n. 9 (1975), does not warrant the invasion of the state judicial proceedings. There the injunction issued was not directed at the state prosecution* or court proceeding as such but to the legality of pretrial detention without a judicial hearing, while the injunction herein is directed at the whole civil contempt process in New York. The order below does not simply direct that a hearing be held but rather, in practical effect, enjoins the whole statute.** Furthermore, the Florida procedure found objectionable in *Gerstein* eliminated any *opportunity* for a hearing. *Id.,* at 116. The detention was

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* The case was before a single federal judge because no state statute was involved. 355 F. Supp. 1286 (S.D. Fla. 1973), aff. & vac. in pt. 483 F. 2d 778 (5th Cir. 1973).

** This is demonstrated by *Darbonne* v. *Darbonne,* 85 Misc 2d 267, 379 N.Y.S. 2d 350 (Sup. Ct. Kings Co., 1976), decided after the decision herein but before the stay of judgment granted by this Court. Despite the deleterious effects, *id.,* at 270, the court simply would no longer enforce by contempt proceedings a husband's obligation to pay an allowance ordered by the court in a matrimonial action. This obtains whether counsel is present or not whether or not the husband has the ability to comply.

effectuated by the prosecutor's action, not a judge. Thus the federal court was not reviewing a state court order.

The appellees could not ignore state court orders and bypass orderly judicial review in the state court by the institution of the district court action here. *Walker* v. *City of Birmingham,* 388 U.S. 307, 319 (1967); *Maness* v. *Meyers,* 419 U.S. 449, 458 (1975).

B. "Full faith and credit" and *res judicata*

The order appealed from also violates the "full faith and credit" clause of the United States Constitution, Art. 4, § 1. *Franklin National Bank* v. *Krakow,* 295 F. Supp. 910, 916 (D.D.C. 1969) citing *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U.S. 183 (1941) and *Davis* v. *Davis,* 305 U.S. 32 (1938). It has failed to give same to state court orders. Moreover, the instant action was an unjustified interference with the duty of state courts to enforce their judgments, *Porto Rico* v. *Rosaly y Castillo,* 227 U.S. 270 (1913). It was calculated to deprive such courts of their authority to enforce such judgments, *Central National Bank* v. *Stevens,* 169 U.S. 432, 464, 465 (1898), such as the failure to testify in supplementary proceedings. *Cf. Bevan* v. *Krieger,* 289 U.S. 459 (1933). There this Court upheld commitment of a witness by a notary, not a judicial officer, who refused to testify at a deposition. As the witness, at 465, refused to answer questions,* the "attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt". The petitioner requested no consideration of his rights by the notary, was denied no hearing by that officer and thus was not denied due process.

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* At no point, have the appellees, certainly Vail, indicated any willingness to respond or answer the subpoenas herein in supplementary proceeding.

If there is any constitutional defect in the order of the state court, the remedy was to appeal, *Huffman, id.* at 605 with this Court as the ultimate remedy or avenue of appeal.

Certainly the decision below took an unduly narrow view of *Huffman.* See *Anonymous* v. *Association of the Bar,* 515 F. 2d 427, 432, n. 2 (2d Cir. 1975) cert. den. —— U.S. ——. Principles of federalism and comity are not to be discarded simply "by calling the state proceeding civil".

It should also be added that besides comity, the principle of *res judicata* has application to the appellees' institution of suit in the federal court. *Mertes* v. *Mertes,* 350 F. Supp. 472 (D. Del. 1972), affd. 411 U.S. 961 (1973); *Godoy* v. *Gullotta,* 406 F. Supp. 692, 693 (S.D.N.Y. 1975) which states:

> "*Mertes* . . . makes clear that the mere fact that a state court has not considered a constitutional defense will not prevent its judgment from being a bar to a subsequent federal action under the Civil Rights Act".

In the instant case contempt was adjudicated against appellees on the merits. The appellees could not relitigate contempt in the federal courts or raise constitutional objections thereto.

It is patent that in every respect, the district court was attempting with one fell swoop to rewrite the established law dealing with procedures supplementary to judgment without any record to support its strictures. *Cf. Lindsey* v. *Normet,* 405 U.S. 56, 74 (1972), against "federalizing" the law of landlord and tenant.*

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* *Lindsey* might appear to support rejection of abstention, *id.* at 62, n. 5. However this Court carefully noted, at 59, ". . . before statutory eviction procedures were begun in the Oregon courts, appellants filed suit in federal district court . . ." This hardly fits the facts of the instant case.

POINT II

The complaint presented no substantial federal question. The statutes at issue provide reasonable notice, an opportunity to be heard, the right to counsel, and punishment in the discretion of the court.

Both at first blush and upon detailed analysis of the reasons given by the District Court it is patent that appellees never raised a substantial federal question in their complaint.

Despite the numerous constitutional objections the district court found, the declaration of facial unconstitutionality of Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 was erroneous. It is hard to conceive that the seven sections are always used in bad faith or to harass or are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it". *Huffman, supra* quoting *Younger* v. *Harris,* 401 U.S. at 53-54 and *Watson* v. *Buck,* 313 U.S. 387, 402 (1941).

New York's statutes on their face provide notice and a hearing and this was, of necessity, recognized in the opinion below (J.S. 7a).• The Judiciary Law provides what is basic to our jurisprudence, "(a) person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . .". *In Re Oliver,* 333 U.S. 257, 273 (1948).

Contrary to the district court, the Court of Appeals in its own Circuit has upheld the basic constitutionality of the contempt procedure and statutes in New York. Indeed that court held that no substantial constitutional question was

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• "It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable".

presented, thus not requiring a three-judge court. *Agur* v. *Wilson,* 498 F. 2d 961, 967 (2d Cir. 1974), *cert. den.* 419 U.S. 1072, *reh. den.* 420 U.S. 939. The statutes are simply procedural and evocative of the power of a court to punish a contempt. *On their face,* these statutes provide for *due process, In Re Oliver, supra, Agur, supra.*

As in *Agur, supra,* at 967, no one can doubt that every appellee was given the opportunity for a hearing. No valid excuse has been given for non-participation. Certainly there is no reason to suppose that one has a right *not* to obey a court order on the assertion in another court, that appellants would not observe their constitutional rights.

It is absurd to hold all these statutes unconstitutional on their face, when *Agur* specifically upheld Judiciary Law §§ 770, 772 and 774(1). At least in *Agur* the complaint was pleaded with some specificity. In the instant case, the court states Vail as "typical" and on this basis wipes out the law below. *Agur* demonstrates the law is perfectly constitutional on its face.

And it is not certain that New York law is as clear as the Court below thought (J.S. 4a). While the challenged statutes, Judiciary Law, Art. 19 (§§ 753 *et seq.*) were originally enacted in 1909 (J.S. 5a), their application to enforcement of money judgments via disclosure subpoenas is relatively recent. It dates from 1963 and the enactment of the Civil Practice Law and Rules; CPLR 5251. The application or what is permissible has never been interpreted by the courts of New York *in light of* the constitutional issues herein. *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 420 (1964).•

• Other state law defenses may be involved and presented in state court such as being told one did not have to appear in court (n. 8 to opin. below) (J.S. 15a).

As will be shown *infra,* New York procedure on contempts of the nature involved here is not uniform. Certainly the procedure

(footnote continued on following page)

It should be noted that the private defendants herein (not appealing), did not deprive appellees of their constitutional rights by seeking contempt citations in state court. It may be true that "to act 'under color' of law does not require the accused to be an officer of the state", and "it is enough that he is a willful participant in joint activity with the State or its agents." *United States* v. *Price,* 383 U.S. 787, 794 (1966), quoted and relied upon in *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 155 (1970). Yet there is no authority that a private person, by asking a state court to make an award against another which is claimed to be unconstitutional is violating 42 U.S.C. § 1983. To the contrary, the Court of Appeals in the very Circuit as the court below has squarely held that "merely by holding its courts open to litigation of complaints [a state] does not clothe persons who use its judicial process with the authority of the state in the sense [required by § 1343];" *Stevens* v. *Frick,* 372 F. 2d 378, 381 (2d Cir. 1967), *cert. den.* 387 U.S. 920 (1967); see also *Henry* v. *First National Bank of Clarksdale,* 444 F. 2d 1300, 1309-10 (5th Cir. 1971), *cert. den.* 405 U.S. 1019 (1972).

A. That a statute permits adjudication of contempt without an actual hearing is not unconstitutional on its face

Besides the still valid holding that due process does not require additional notice to a judgment debtor who had had his day in court before judgment was rendered, *Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.,* 266 U.S. 285

(*footnote continued from preceding page*)

in Dutchess County is not the pattern for the entire state. Abstention to obtain a state interpretation of the contempt hearing procedure was suggested to the district court. As in *Carey* v. *Sugar,* —— U.S. ——, 47 L. Ed. 2d 587 (1976), it is entirely possible the New York courts could construe the Judiciary Law in a manner to obviate any of the constitutional problems envisaged below. Already one state appellate court, has commented on the decision below, and in a manner rendering any constitutional decision unnecessary. *Walker* v. *Walker,* 51 A D 2d 1029, 1030, 381 N.Y.S. 2d 310 (2d Dept. 1976).

(1924), the law also is clear that due process does not require the actual presence of the alleged offender in a contempt proceeding. If the notice served is sufficient to inform him of the character of the charge against him and of the hearing at which he would have an opportunity to present his defense, due process is provided. *Blackmer* v. *United States,* 284 U.S. 421, 443 (1932). In that case the petitioner, a contemnor, failed to answer a subpoena and objected to the procedure in enforcing contempt under the federal Walsh Act, then 28 U.S.C. §§ 711-718 (284 U.S. at 433). The issue of presence and notice was squarely presented. *Id.* at 436 (objections 3 and 4 below). In reply this Court stated, *id.* at 442-443:

> "It was sufficient that the subpoenas required his attendance to testify on behalf of the United States at the time and place stated. Equally unavailing is the objection that after the petitioner had refused to appear in response to the subpoenas, the orders to show cause why he should not be punished for contempt did not specify the offense. As the statute prescribed, he had been served with the subpoenas, and had defaulted and he had also been served with the order which directed him to show cause why he should not be adjudged guilty of contempt and provided for the seizure of his property to be held to satisfy any judgment that might be rendered against him in the proceeding. The notice which he thus received was sufficient to inform him of the character of the charge against him and of the hearing at which he would have opportunity to present his defense."

See also *In Re Oliver, supra.*

Reliance by the opinion below (J.S. 15a, n. 18) on *McNeil* v. *Director, Patuxent Institution,* 407 U.S. 245, 251 (1972) and *Harris* v. *United States,* 382 U.S. 162, 167 (1965) is wide of the mark. Both cases involve incarcera-

tion without an opportunity for a hearing. Thus in *McNeil*, the State of Maryland claimed the power to confine petitioner indefinitely without ever obtaining a judicial determination (249). The Court held (251) a hearing was required to determine whether petitioner was in "contempt". Similarly *Harris*, where the judge punished summarily a contempt committed out of his presence. In both cases the petitioners were present but there was no hearing. On the other hand, there has been a "hearing" in every case of appellees on the order to show cause. If appellees wished to controvert any facts or the affidavits then they must appear for the hearing, not default. In sum they deprived themselves of a hearing.

Having been fined by order properly served, apparently the appellees argued and the court below agreed that another hearing was necessary before commitment issue (J.S. 7a). Yet the fining order provides for personal service and notice. If appellees wished to contest their contempt* they could still move to vacate (CPLR 5015) and seek a stay or temporary restraining order on the fine and commitment. *Cf. Brumfield* v. *Tofany*, 31 N Y 2d 928, 293 N.E. 2d 92 (1972). The requirement of an *actual* hearing carried to its logical extreme would require the state court to *ex parte* issue a warrant to arrest and bring into court every person simply accused of civil contempt.** If the alternative were mandated, thousands of alleged offenders would be arrested to insure their presence in court.

In point of fact in the Civil Court of the City of New York, where perhaps more supplementary proceeding con-

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* It does not appear, even now, that any appellee is willing to obey the original subpoena and submit to examination as to assets, etc.

** This procedure is allowed as an alternative procedure under Judiciary Law § 757(2), which in its sweeping opinion, the district court also declared unconstitutional. *Cf. Blouin* v. *Dembitz*, 367 F. Supp. 415, 420 (S.D.N.Y. 1973), aff'd. on other grounds (abstention), 489 F. 2d 488 (2d Cir. 1974).

tempts are instituted, the result of a default on an order to show cause [Judiciary Law § 757(1)] is an order denominated a "bailable attachment" directing the Sheriff to produce the respondent in court. This is under §§ 757(2), 762 and bailable in a sum set by the judge, § 764. Indeed the Civil Court has a whole set of rules for enforcement of money judgments and contempts. 22 NYCRR (Codes, Rules & Regulations, State of New York) §§ 2900.27, 28.*

As an example of the procedure in the Civil Court, see *Sure Fire Fuel Corp.* v. *Martinez*, 75 Misc 2d 714, 348 N.Y.S. 2d 502 (Civil Ct., N.Y. Co., 1973). Even in default "this court should not issue a finding order with a provision for commitment without first bringing the debtor before the court" (716). Yet the court in *Sure Fire* was applying the same statutes declared to be unconstitutional *on their face* by the district court. See also *Uni-Serv Corp.* v. *Batys*, 62 Misc 2d 860, 311 N.Y.S. 2d 456, and *Linker*, 62 Misc 2d 861, 311 N.Y.S. 2d 726 (Civil Ct., N.Y. Co., 1970). Actually, at most, the courts of Dutchess County were unconstitutionally *applying* the Judiciary Law. The prophylactic for that though is an appeal to a higher state court, not an independent action in federal court.

An interpretation of Judiciary Law § 757 to obviate any constitutional problems would require a court to first follow § 757(1) and then if there was no appearance, proceed under § 757(2). *Sonn* v. *Kenny*, 63 Misc. 251, 116 N.Y.S. 613 (Sup. Ct., App. T. 1909); *Matter of Nejez*, 54 Misc. 38, 40, 41, 104 N.Y.S. 505 (City Ct. N.Y. 1907),** ("There is nothing . . . which required the court upon a default and without hearing the accused to determine that he has committed contempt of court.") see also *Mahoney* v. *Sutphin*, 164 App. Div. 794, 150 N.Y.S. 206 (2d Dept., 1914).

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* The standard form of "order imposing fine" on Vail included issuance of a warrant and bringing Vail before the court, but was crossed out. Query: Was this proper?

** *Nejez* describes the practice of issuing bailable attachments in the City Court, the predecessor of the Civil Court.

Since the courts in the State of New York do, in most instances, follow a procedure constitutional even in the view of the district court, the order below should be vacated with directions to the district court to abstain so that the state court can interpret its own law. *Cf. Carey* v. *Sugar, supra.*

Is is not a violation of due process to allow a judge to exercise discretion. It cannot be assumed that a judge will not act to preserve constitutional rights. *Cf. Cedar Rapids Eng. Co.* v. *Haenelt,* 39 A D 2d 275, 277, 333 N.Y.S. 2d 953 (2d Dept. 1972), app. dsmd. 31 N Y 2d 780, 291 N.E. 2d 387.

Citation of *Desmond* v. *Hachey,* 315 F. Supp. 328 (D. Me. 1970) (J.S. 15a, n. 9) is inapposite. The statute in *Desmond* made no provision for the issuance of an order to show cause, returnable before a judge, where the judgment debtor could explain his default. See *Desmond, id.* at 332. New York procedure clearly "provides an opportunity . . . prior to incarceration, why he failed to obey the subpoena . . .", *id.* at 333. As with *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), the process was non-judicial. Where a judge controls the process and a hearing is scheduled, due process is satisfied. *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974).

The whole question of due process and procedure on default in a contempt is discretionary. See *Matter of Hildreth* (*Storm*), 28 AD 2d 290, 284 N.Y.S. 2d 755 (1st Dept. 1967). As stated there the power to punish a person for civil contempt for failing to pay money is discretionary. It "is to be exercised in the light of facts and circumstances in each particular case. The petitioner establishing a refusal to pay the sum of money directed to be paid is not generally entitled as a matter of law to an order committing the respondent for contempt." (Citing cases). Also the nature and extent of punishment is an exercise of the court's discretion. *Id.* at 293 citing 21 Carmody-Wait, New York Practice, § 157, p. 310.

B. That a statute fails to specifically provide or recite that a failure to respond to a subpoena may result in imprisonment is not unconstitutional on its face

At the outset it must be noted that none of the statutes involved specify the form of notice or the wording of the order to show cause. The statute does provide for language in the show cause order why the person served should not be "punished for the alleged offense" (§ 757, subd. 1). The statute on its face does not prohibit notice of the penalty or the consequences of not appearing in response to the order to show cause. But the type of notice specifying the time and place for the hearing and the offense charged to be personally served fully satisfy due process. *Cf. Blackmer* v. *United States, supra,* 284 U.S. 421. It is only when the person served is under some special disability that due process might require better notice. *Covey* v. *Town of Somers,* 351 U.S. 141, 146-147 (1956). The district court imported as a due process requirement that the order to show cause *must* include notice of penalty and that the failure to mandate such notice was fatal to the statute. The district court simply interposed its own personal view as to the due process requirement without any factual evidence to support such imposition.*

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* The district court requirement has been part of the Rules of Practice of the Civil Court of the City of New York, *supra,* for many years in the issuance of the original subpoena (at least Sept. 30, 1973). 22 NYCRR § 2900.27(f) *supra.* To quote:

"(f) Every subpoena or other process providing for the examination of a judgment debtor or other person, including a garnishee, in addition to the other requirements of CPLR 5223, shall have endorsed on its face, in bold type, the words: 'This subpoena or process (as the case may be) requires your personal appearance at the time and place specified. Failure to appear may subject you to fine and imprisonment for contempt of court' ".

(footnote continued on following page)

Certainly the cases the court below relied on fail to support any requirement of a "warning" on a subpoena as to fine or imprisonment. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (n. 20, 16a) deals with notice of service by publication, not the contents of the notice. The contempt proceedings herein were brought on by personal service of an order to show cause. The case of *Lynch* v. *Baxley*, 386 F.Supp. 378, 388 (M.D. Ala. 1974) involves persons alleged to be under a mental disability.* The instant case obviously involves persons of sound mind who are capable of understanding the meaning of "contempt".

C. That a statute fails to specifically provide a right to counsel, and assigned if indigent is not unconstitutional on its face

There is no question that appellees could have appeared by counsel at the hearing on contempt in state court if they so chose. Indeed there is no claim that appellants were deprived of the *right* to have counsel. All *Cooke* v. *United States*, 267 U.S. 517 (1925), *cf.* opin. below (J.S. 16a, n. 23) requires is "the right to be represented by counsel". This is explained in *In Re Oliver*, *supra*, 333 U.S. at 275. No mention is made of assigned or free counsel for indigents.

Yet, although the court below does not clearly say so, its opinion appears to mandate that the alleged offender must have counsel assigned if indigent. The statutes do

(footnote continued from preceding page)

Obviously the "unconstitutional" statutes herein were constitutional in New York City.

* To this extent *Lynch* is similar to *Covey*, *supra*. Furthermore *Lynch*, apparently unappealed, cites *Lessard* v. *Schmidt*, *supra*. *Lynch* clearly would be subject to abstention, *Huffman* v. *Pursue*, *Ltd.*, on authority of *Schmidt* v. *Lessard*, *supra*, 421 U.S. 957.

not deny appellees the assistance of counsel upon request and the question is open. See *Walker* v. *Walker*, *supra*, 51 AD 2d 1029. (Curiously, the court below engaged here in the illogical process of treating the civil contempt process as criminal, while in discussing abstention is treated the state proceeding as civil.)

It should be noted that right to assigned counsel is discussed in *Abbit* v. *Bernier*, 387 F. Supp. 57, 62, n. 12 (on 63) (D. Conn. 1974), and relied on by the court below (J.S. 16a, n. 23). But all the *Abbit* court stated was that:

> "Although a contempt proceeding may also result in imprisonment, a right to counsel is unrecognized largely because these possible intricacies [factual and legal issues of potential complexity] are missing. While a § 52-369 hearing on ability to pay would attempt to weigh the validity of reasons for not complying with a court order, a civil contempt proceeding inquires no further than the presence or absence of compliance."*

Certainly there may be cases where counsel should be assigned but this should be left to the discretion of the state trial judge. It is not an inflexible due process requirement. *Duval* v. *Duval*, 114 N.H. 422, 322 A. 2d 1, 3-4 (1974). As in much of due process, flexibility is the keynote. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788-791 (1973); *Middendorf* v. *Henry*, —— U.S. ——, 47 L. Ed. 2d 556, 566 (1976).

Still whether appellees were entitled to assigned counsel in state contempt proceedings is hypothetical. It was

* *Abbit* v. *Bernier*, *supra* (D. Conn. 1974) also is entirely different. It involves a clear case of imprisonment for debt (failure to pay a tort judgment) not disobedience of a court order, and subsequent contempt. Contrary to Connecticut procedure, New York expressly provides for a preincarceration hearing on the failure to appear for examination.

never established that the appellees were, in fact, indigent. Since the appellees did not appear in response to the order to show cause the subject obviously never arose. *Cf. Argersinger* v. *Hamlin*, 407 U.S. 25, 26 (1972).**

On the other hand, where a person is faced with civil contempt for failure to pay support, an appeals court in New York has ruled that he is to be advised of his right to counsel and have it assigned if indigent. *Rudd* v. *Rudd*, 45 A D 2d 22, 356 N.Y.S. 2d 136 (4th Dept. 1974). See also *Walker* v. *Walker*, *supra*. On right to counsel, *if requested*, see generally *Annotation: Right to Counsel in Contempt Proceedings*, 52 ALR 3d 1002.

D. That a statute, in part, permits a fine of up to $250 without showing actual loss or injury is not unconstitutional on its face (Judiciary Law § 773)

The court below held that the fine of $250 payable to the judgment-creditor for his damages for the non-appearance was violative of due process. This only involves Judiciary Law § 773, which permits such a fine not in excess of $250 in the absence of any other proof of damage.

The first sentence of § 773 in mandating fine "sufficient to indemnify the aggrieved party" is perfectly constitutional and in accord even with the district court's view of "actual loss" (J.S. 8a). Inexplicably though the whole statute is declared unconstitutional.

In any event, the $250 fine later mentioned is the maximum, *Stewart* v. *Smith*, 186 App. Div. 755, 175 N.Y.S. 468 (1st Dept. 1919); *Stark* v. *Kessler*, 277 App. Div. 1122, 100 N.Y.S. 2d 872 (2nd Dept. 1950). The maximum is not so disproportionate to the contempt as to be condemned on due process grounds. *Sunbeam Corp.* v. *Golden Rule Ap-*

** In the affidavit of Thomas A. Reed (¶ 4[b], 80a) it is averred appellee Russell was represented by counsel, the same as in the instant action.

pliance Co., 252 F. 2d 467, 470 (2d Cir. 1958). The payment of the fine to the judgment-creditor is in accord with the authorities. *United States* v. *Mine Workers*, 330 U.S. 258, 304 (1947); *Gompers* v. *Bucks Stove & Range Co.*, *supra*, 221 U.S. at 441 (1911); *Atlas Corp.* v. *DeVilliers*, 447 F. 2d 799, 803 (10th Cir., 1971), *cert. den.* 405 U.S. 933, *reh. den.* 405 U.S. 1033. Furthermore, the fine or "punishment" is based on a specific finding that besides committing the offense charged "that said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment-creditor." (Judiciary Law § 770). Damages, even if denominated a "fine" are warranted even if no "actual loss or injury has been sustained" (§ 773). By way of analogy, a federal civil rights action, under 42 U.S.C. § 1983 as the instant case, absence of actual damages does not defeat the action. *Sexton* v. *Gibbs*, 327 F. Supp. 134, 142 (N.D. Tex. 1970), affd. 446 F. 2d 904 (5th Cir. 1971), *cert. den.* 404 U.S. 1062 (1972). Even in absence of actual damages, federal law permits recovery of punitive damages. *Spence* v. *Staras*, 507 F. 2d 554, 558 (7th Cir. 1974). Thus how can it be said the New York statute violated constitutional rights by imposing a "punitive" fine payable to the judgment-creditor.

In addition, the holding below mandating the necessity of a hearing as to the imposition of penalty even upon non-appearance in response to the order to show cause appears to be at odds with this Court's recent decision in *National Coal Operators' Ass'n.* v. *Kleppe*, —— U.S. ——, 46 L. Ed. 2d 580. There this Court said (*id.* at 587-588) that any requirement for a hearing must be keyed to a request by the mine operators. The statute there involved provided the mine operators with no more than an "opportunity" for a hearing. "When no request for a hearing is made, the operator has in effect voluntarily defaulted and abandoned the right to a hearing and findings of fact on the factual basis of the violation and the penalty." (*id.* at 589). In the instant case the appellees had the "opportunity" also.

New York's procedure in the enforcement of the order to show cause is reasonably based. The adoption of the procedure applicable to applying civil contempt to supplementary proceedings under CPLR 5251 (1963), was explained in 6 Weinstein-Korn-Miller, *New York Civil Practice*, § 5251.02, as due to the deficiencies of the prior law (N.Y. Civil Practice Act). Cited was the "notorious disregard for court orders and process relating to the enforcement of judgments . . .", 52-745. To quote (52-746):

> "Even when the Civil Practice Act provided sanctions, they frequently were ignored in practice and the violator merely ordered to do what he initially was supposed to do, with no additional penalties being imposed. Thus, although failure to appear for an examination pursuant to a subpoena or court order was punishable as a contempt, judgment debtors learned that they could willfully flout the order of subpoena; for upon their appearance pursuant to an order to show cause, courts almost invariably required only submission to the examination."

Provisions for relief from imprisonment are provided. 9 N.Y. Jur., *Contempt*, § 66, pp. 393-394.* *It must be emphasized that appellees never sought to excuse their failure to pay the fine in the State court or claim they were unable to do so.* Therefore, so far as the record in the State court showed, the appellees were fined and failed to pay; there is no showing they could not pay. Indeed, as we have pointed out, the fines were immediately paid in all cases of imprisonment.

As the *Atlas* case (447 F. 2d at 803) shows the imprisonment is not for debt and, in fact, New York has a long standing policy against enforcing money judgments by contempt based on the belief that the use of contempt sanction under such circumstances would be tantamount to imprisonment for debt. 6 Weinstein-Korn-Miller, § 5251.03.

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* Contrary to the views of the court below (J.S. 8a., n. 2), it is not necessary to imprison the appellees before relief can be granted. *Matter of Hildreth, supra*, 28 AD 2d 290.

See also *Matter of Reeves* v. *Crownshield*, 274 N.Y. 74, 79, 8 N.E. 2d 283, 111 A.L.R. 389 (1937).

POINT III

It was not proper to grant class action relief.

In a separate memorandum, Judge MacMahon, as a single judge,* granted class action relief pursuant to Rule 23, Federal Rules of Civil Procedure (J.S. 17a). By creating a class consisting of all persons who have been, or presently are, subject to civil contempt proceeding the order went way beyond the parameters of the case before it (J.S. 20a).

Thus it covered persons represented by counsel, able to pay the fines, completely aware of the consequences of contempt, those fined to compensate the judgment-creditor in sums greatly above any punitive fine of $250. While it can be conceded all persons subject to civil contempt have an interest in not being held in contempt, it is doubtful a federal court, with any awareness of equity, federalism and comity, should entertain such base desires.

Obviously, the class covered persons such as the plaintiff in *Agur* v. *Wilson, supra* and or appellant in *Walker* v. *Walker, supra*. Yet these persons are not deprived of any constitutional rights by being held in contempt. The questions of law simply were not common to the class. Rule 23(a)(2), Fed. Rules of Civ. P.

The memorandum confused the case by lumping into the class the whole spectrum of contempt offenders without any

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* While not crucial, *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974), cf. n. 1 to opinion below (J.S. 10a), hardly warranted or authorized a single judge to decide the class action motion. *Hagans* simply states that if constitutional and federal statutory claims on the merits are presented, a single judge can decide the latter. The scope of the class is a function of the jurisdiction of the three-judge court.

reasonable basis. Its pervasive effect was shown by the decision of the local sheriffs not to execute any contempt fine orders in matrimonial non-support cases until the stay order was issued by Justice Marshall. *Darbonne* v. *Darbonne, supra,* 85 Misc 2d at 270 (see New York Law Journal, Jan 12, 1976, p. 1, col. 3).

POINT IV

The court below erred in granting partial summary judgment and determining the merits with a final injunction without a trial.

The procedure followed by the District Court also renders the order below erroneous. The court below granted a final judgment against the constitutionality of the several statutes in favor of appellees, without a trial. At the time this action came before the court the appellees were moving for a preliminary injunction and the appellants were moving to dismiss. The appellees made no request to the court below (by way of motion) for final or even partial summary judgment. The appellees had not answered, but only moved to dismiss (164a). The remainder of the defendants below (the Sheriff and the judgment-creditors) had answered and even submitted affidavits controverting many material "facts" or conclusions the district court relied on (79a, 82a, 148a, 156a, 160a, 162a). Yet, the district court granted a declaratory judgment and a permanent injunction, striking down numerous State statutes without a trial of the necessarily disputed issue of indigency the Court itself found material, and without any procedural safeguards such as a Federal Rules of Civil Procedure Rule 56 summary judgment motion.

The particular vice of course is that the District Court assumed as facts the allegations of the complaint and statements in affidavits as a basis for a final judgment of unconstitutionality. Thus, the district court decided that

all the appellees were indigent,* decided that every inference would be in favor of appellees and, in general, denied appellants herein their procedural rights guaranteed by the Federal Rules of Civil Procedure. In so doing the district court acted contrary to the law in its own circuit, even where there are motions for summary judgment from all parties. *Rhoads* v. *McFerran,* 517 F. 2d 66 (2d Cir. 1975).* Obviously, the question of indigency, notice, amount of fines had never been presented to the state courts, but the federal court, without a hearing, solely on affidavits and without a motion to go to final judgment decided all issues.

POINT V

The retroactive nature of the judgment is in defiance of established authorities.

The making of the judgment retroactive to all state court contempt proceedings in the state of completion was in defiance of *res judicata* and unsupportable on the record before the District Court. The final judgment swung its sword retroactively as well as prospectively. It wiped out thousands of civil contempt orders in New York without regard to the effect on the administration of justice in New York. It certainly laid out new standards for an entire body of law in New York. This was in utter contradiction of the principle of *res judicata* applicable in each of the completed contempt proceedings. There can be no

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* Our brief below showed, on appellees' own affidavits, some plaintiffs were not indigent, but simply would not accept the judgment of the state court (see also, ftn. p. 7).

* A three-judge statutory district court is bound by the law applicable in its district and circuit. *Sunshine Anthracite Coal Co.* v. *Adkins,* 31 F. Supp. 125, 127 (E.D. Ark. 1940), affd. 310 U.S. 381 (1940). On the merits, this included *Agur* v. *Wilson, supra,* which the district court ignored, despite the fact that the Circuit Judge on the panel below was on the panel in *Agur.*

doubt *res judicata* applied. *Mertes* v. *Mertes, supra,* 350 F. Supp. 472; *Godoy* v. *Gullotta, supra,* 406 F. Supp. 692.

Furthermore, even in clearly criminal cases, retroactive application of a decision must be based on certain factors: (1) purpose to be served by the new standards; (2) the extent of the reliance by public officials on the old standards; (3) effect on the administration of justice of a retroactive application of the new standards. *Daniel* v. *Louisiana,* 420 U.S. 31 (1975). Even in the exercise of proper judicial discretion, the court below could not justify giving retroactive effect to its declaration of unconstitutionality. Regardless of whether the new standards are correct* they should have only operated prospectively. What its massive effect will be if the order below is not reversed is impossible to estimate at this time.

CONCLUSION

The order below should be reversed.

Dated: New York, New York, August 4, 1976.

Respectfully submitted,

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* That the standards may be "better" is not in issue. The State courts can apply them by court rule, see 22 NYCRR § 2900.27 or decision, *Walker* v. *Walker, supra.*

Appendix—Statutes Declared Unconstitutional (Judiciary Law).

§ 756. Issue of warrant without notice

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

§ 757. Order to show cause, or warrant to attach offender

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court at which a contested motion may be heard.

§ 770. Final order directing punishment; exception

If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defect, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except where an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may in its or his discretion deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

§ 772. Punishment upon return of order to show cause

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

§ 773. Amount of fine

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§ 774. Length of imprisonment and periodic review of proceedings

1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the

offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. If the term of imprisonment is not specified in the order, the offender shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more. If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine imposed is five hundred dollars or more in addition to the specified time of imprisonment.

2. In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from imprisonment, shall be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and further reviews of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. Where such imprisonment shall have

arisen out of or during the course of any action or proceeding, the clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in such action or proceeding, at their last known address.

§ 775. When court may release offender

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1397

JOSEPH JUIDICE, etc., *et al.*,

Appellants,

v.

HARRY VAIL, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

I. Does the Fourteenth Amendment require that the show cause order, issued pursuant to New York Judiciary Law §757, warn debtors that failure to appear at the show cause hearing might result in imprisonment?

II. Does the Fourteenth Amendment prohibit debtors from being jailed without being advised of their right to counsel or being assigned counsel if indigent, as permitted by New York Judiciary Law §§756, 757, 770, 772, 774, and 775?

III. Does the imposition of punitive rather than compensatory or remedial fines pursuant to New York Judiciary Law §§756, 770, 773, and 774 deprive appellees of their rights in violation of the Fourteenth Amendment?

IV. Does the Fourteenth Amendment prohibit the jailing of debtors without bringing them before a judge, because they have not paid a fine, as authorized by New York Judiciary Law §§756, 757, 770, 772, 773, 774, and 775?

V. Should the three-judge court have enjoined the use of procedurally unconstitutional civil contempt statutes?

VI. Did the three-judge court correctly decide to rule on the constitutionality of the New York civil contempt statutes, which were not capable of a constitutional interpretation?

VII. Should this court decline to consider appellants' *res judicata* claim when they did not raise the question in their Jurisdictional Statement or in their district court brief? Do state and federal doctrines of *res judicata* permit this action?

VIII. Did the three-judge court correctly grant partial summary judgment when the statutes were declared unconstitutional on their face and there were no issues of material fact?

IX. Did the three-judge court properly grant class relief?

X. Did the three-judge court properly grant present and prospective relief?

STATEMENT OF THE CASE

The eight named plaintiffs are debtors who were jailed or threatened with incarceration pursuant to New York Judiciary Laws §§756, 757, 770, 772, 773, 774,

and 775 (hereinafter referred to as §756, etc.) for their noncompliance with post-judgment discovery procedures and their failure to pay a contempt fine. Each debtor initially was the subject of a default judgment.[1] (A.13a, A.20a, A.25a, A.55a, A.58a, A.64a). The creditor's attorney then served a subpoena[2] according to N.Y.C.P.L.R. §§5223 and 5224(a)(1) (McKinney 1963) requiring the debtor to appear before the attorney and a notary public for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment. (A.13a, A.20a, A.25a, A.55a, A.58a, A.64a). When the debtors did not appear for the deposition, the creditor's attorney instituted civil contempt proceedings against the debtors pursuant to N.Y.C.P.L.R. §5251 (McKinney 1975, amending McKinney 1963) and §753.

Based upon the subpoena, an affidavit of service, and an affidavit by the creditor's attorney indicating that the debtor did not appear and that his conduct was calculated to and did actually defeat, impair, and prejudice the rights and remedies of the judgment creditor, state Judge Aldrich or Juidice issued a show cause order pursuant to §757(1).[3] (A.13a, A.25a, A.59a, A.65a). In each instance, the order required the debtor to appear at a specific time and place to show cause "why he should not be punished as for contempt for violation of and non-compliance with said subpoena in that he failed to appear or respond thereto". When the debtor did not appear, Judge Aldrich or Juidice held the debtor in contempt under §§770, and 772 and issued an "Order Imposing Fine".[4] (A.14a, A.22a,

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[1] Rabasco was the only exception to this pattern. Civil contempt proceedings were instituted against him by his wife when he failed to comply with a court order of support. (A. 69a-71a).

[2] Exhibit #1 – Subpoena.

[3] Exhibit #2 – Order to Show Cause.

[4] Exhibit #3 – Order Imposing Fine.

A.26a, A.56a, A.60a, A.65a). The Order Imposing Fine commanded each debtor to pay a fine within a specific period of time or face incarceration until the fine was paid. According to §773, a fine of $250 plus costs and attorneys fees was imposed without proof of loss or injury and paid to the creditor.[5]

When each debtor failed to pay the fine within the specified period of time, Judge Aldrich or Juidice issued an *ex parte* commitment order[6] pursuant to §756 (A.16a, A.27a, A.56a, A.60a, A.65a). Each commitment order was issued based upon the papers previously submitted on the application for the order to show cause, the affidavit of the creditor's attorney stating that the debtor had not paid the full amount of the fine, and an affidavit of a process server stating that the debtor had been served with the contempt order. The statutes do not require that prior to the issuance of the commitment order a finding be made of willful refusal to obey the order imposing fine. Pursuant to §774 each commitment order directed that the debtor be arrested without further notice by the Sheriff of any county and that the debtor be committed to county jail until the fine, costs, attorney fees, sheriff's fees, and disbursements on the execution of the order were paid.

Plaintiffs Ward and Hurry were subjected to the imminent threat of incarceration as they did not pay the contempt fine. (A.23a). Plaintiff Rabasco was subjected to the threat of incarceration as a result of his wife's application for a contempt order for nonsupport. (A.71a). Plaintiffs Vail, McNair, Nameth, Humes,[7] and Harvard were arrested and incarcerated

[5] Thus, while the underlying judgment in Ward's case was $146.84, he was fined $250 plus $20 for costs and expenses. The creditor kept the entire $250 as specified in §773.

[6] Exhibit #4 – Commitment Order.

[7] Nameth and Humes were arrested and incarcerated on February 10, 1975, in violation of a Temporary Restraining Order issued by Judge Thomas P. Griesa on January 8, 1975, to prevent their arrest. They were released 5 hours later by defendant Juidice. (A. 118a-A.124a).

pursuant to §§756 and 774. (A.18a, A.27a, A.65a, A.120a, A.123a). Plaintiffs Vail, McNair, and Harvard were held in Dutchess County Jail until they paid the fine specified by the County Court in its contempt order plus costs and sheriff fees. (A.18a, A.28a, A.66a).

On October 30, 1974, plaintiffs Vail, Ward, and McNair, individually and on behalf of all other persons similarly situated, filed a verified complaint seeking to have the court declare invalid and enjoin the enforcement of §§756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 on the basis that defendants' use and enforcement of the statutes violate plaintiffs' rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (A.7a). Plaintiffs Vail and McNair also sought damages for the wrongful imposition of a fine and imprisonment under the above cited statutes. (A.33a). Plaintiff Ward sought a temporary restraining order and preliminary injunction against the enforcement of the statutes. (A.32a-37a). On November 6, 1974, U.S. District Judge John M. Cannella issued a temporary restraining order prohibiting defendants "from arresting and imprisoning plaintiff Ward pursuant to New York State Judiciary Law Article 19 until a hearing and determination is made by the full three-judge district court or until this court revokes the temporary restraining order." (A.50a).

On January 2, 1975, U.S. District Judge Thomas P. Griesa issued a temporary order restraining the defendants from arresting and imprisoning plaintiff Hurry. On January 8, 1975, Judge Griesa issued a temporary order restraining the defendants from arresting and imprisoning plaintiffs Nameth, Humes, and Harvard and restraining Hon. W. Vincent Grady and Gladys Rabasco from proceeding with Gladys Rabasco's application for an order of contempt against Joseph Rabasco unless counsel was assigned. (A.51a-54a).

A motion to intervene Nameth, Humes, Rabasco, Harvard, and Hurry, and to add defendants was granted

by U.S. District Judge John M. Cannella on January 28, 1975. (A.3a). A motion to intervene Russell, Thorpe, and Harrell, and to add defendants was made on February 13, 1976 (A.128a) and was never ruled on.

On January 13, 1975, in a memorandum decision, 387 F. Supp. 630 (S.D.N.Y. 1975), U.S. District Judge John M. Cannella granted plaintiffs' motion to convene a three-judge court and denied the defendants' motion to dismiss. (A.101a).

On January 6, 1976, the three-judge court issued an opinion, 406 F. Supp. 951 (S.D.N.Y. 1976), declaring invalid and enjoining the enforcement of §§756, 757, 770, 772, 773, 774, and 775. (Appellants' Jurisdictional Statement 1a, hereinafter referred to as J.S.). In a separate memorandum and order, U.S. District Judge Lloyd F. MacMahon granted the class action motion. (J.S.17a). On January 23, 1976, the three-judge court issued an order granting partial summary judgment for plaintiffs and denying defendants' motion for a stay. (J.S.19a).

On February 12, 1976, Associate Justice of the Supreme Court Thurgood Marshall granted defendants' application for a stay of judgment. (J.S.23a). On March 1, 1976, Justice Marshall denied plaintiffs' application for modification of the stay. On June 21, 1976, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

I.

New York civil contempt statutes violate the Fourteenth Amendment by permitting the jailing of debtors for up to ninety days without being brought before a judge, being advised of a right to counsel, or being assigned counsel if indigent. Debtors are incarcerated for noncompliance with a disclosure subpoena and nonpayment of a punitive fine.

The show cause order must clearly warn debtors that failure to appear at the show cause hearing may result in incarceration. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Otherwise, the proceedings will not achieve their objective of coercing attendance at the hearings and providing information to creditors.

As recognized by most states and federal courts, debtors must be notified of their right to counsel and assigned counsel if indigent in these adversarial proceedings where complex factual and legal defenses may be asserted. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

In civil contempt proceedings, the purpose of fines and incarceration is to compensate the party injured by the contumacious conduct and coerce compliance with a court order. Therefore, only coercive incarceration and compensatory fines may be imposed. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), *Shillitani v. United States*, 384 U.S. 364 (1966).

A judicial hearing is required prior to a finding of contempt and incarceration to insure the fairness and reliability of the decision to imprison as a coercive mechanism. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975). A hearing is needed to resolve the factual and legal issues involving questions of intent which are not susceptible to documentary proof. *Mitchell v. W.T. Grant*, 416 U.S. 600, 617 (1974). Creditors have no special interests that dictate against a prior hearing. Creditors' interests in obtaining information about debtors' assets are not served by the incarceration of indigent debtors or those with no ability to produce the information. The debtors' interests in avoiding erroneous or unwarranted jailings are protected by hearings. Prior hearings serve the public interest by insuring that indigent debtors are not jailed and forced to obtain release by paying contempt fines to creditors with income exempt from execution.

II.

The three-judge court correctly enjoined the use of procedurally unconstitutional civil contempt statutes where the challenged statutes protect private, not public interests. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973). A policy of non-intervention undermines the power of federal courts by permitting private citizens to bar federal court involvement in consumer matters by the simple service of a state court summons.

III.

The three-judge court correctly decided to rule on the constitutionality of the civil contempt statutes, which are unambiguous and incapable of a constitutional construction. *Procunier v. Martinez*, 416 U.S. 396 (1974). No New York court has construed the statutes to require adequate notice, assigned counsel, compensatory fines, and a hearing prior to incarceration.

IV.

This Court should not consider the issue of *res judicata* as Appellants did not raise the question in their Jurisdictional Statement. U.S. Supreme Court Rule 15(1)(c). The three-judge court decision is not barred by state or federal *res judicata*. *Riggs v. Pursell*, 74 N.Y. 370 (1878); *Lombard v. Board of Education*, 502 F. 2d 631 (2d Cir. 1974) *cert. denied*, 420 U.S. 976 (1975).

V.

Partial summary judgment was properly granted where the statutes were declared unconstitutional on

their face and no issues of material fact existed. *Associated Press v. United States*, 326 U.S. 1 (1945).

VI.

Class relief was properly granted as appellees satisfied all requirements of Fed. Rule of Civ. Proc. 23.

VII.

Read in the light of the three-judge court opinion, the court's order was appropriately present and prospective. *Goss v. Lopez*, 95 S. Ct. 729, 734 fn. 6 (1975).

ARGUMENT

I.

NEW YORK JUDICIARY LAW SECTIONS 756, 757, 770, 772, 773, 774, AND 775 VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION

New York civil contempt statutes permit a debtor to be jailed for up to ninety days without ever being brought before a judge for noncompliance with a disclosure subpoena issued by a creditor's attorney and nonpayment of a contempt fine. A debtor may be imprisoned without being notified of a right to counsel or being assigned counsel if indigent. Contempt orders may issue with no finding that there was a willful failure to obey a court order. A debtor may be fined up to

$250 plus costs and Attorneys' fees with no proof that the creditor suffered any loss or that the debtor has the ability to pay. The entire fine is collected and paid over to the creditor even if the fine exceeds the underlying judgment and the debtor's assets and income are exempt from creditor's claims. Even after compliance with the subpoena, the debtor may remain incarcerated for up to ninety days for nonpayment of the fine.[8] Professor Robert Alderman has concluded that "[b]oth the hearings and the issuance of the commitment order appear to be constitutionally suspect as violative of due process, equal protection, and right to counsel guarantees". Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York*, 24 Syracuse L. Rev. 1217, 1239 (1973) (footnotes omitted) [hereinafter cited as Alderman].

The three-judge court properly found that due process requires that:

(1) "A finding of contempt can be properly made only upon a hearing with both parties present" (J.S.7a) (footnote omitted);

(2) The show cause order must "[c]ontain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment" (J.S.8a) (footnote omitted);

(3) Debtors must be advised of their right to counsel and assigned counsel if indigent (J.S.8a);

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[8]Commentators who have examined the procedure have noted that "[t]he law which is rationalized as a procedure through which a debtor can disclose his assets has really become a method of imprisonment for debt. The debtor may be incarcerated for failure to pay a contract debt or attorney's fees." *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 Banking L.J. 291, 306 (1971).

(4) Punitives fines may not be imposed in civil contempt proceedings (J.S.8a-9a).

B. NEW YORK JUDICIARY LAW SECTION 757 VIOLATES DUE PROCESS BECAUSE IT DOES NOT PROVIDE NOTICE TO DEBTORS THAT FAILURE TO APPEAR AT THE SHOW CAUSE HEARING MAY RESULT IN INCARCERATION AND DEPRIVATION OF PROPERTY.

1. Statutory Scheme

Pursuant to §757,[9] appellees were served with an Order to Show Cause setting forth the return date of the motion and advising them that they might be held in contempt of court. The Order to Show Cause served

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[9]While the writ of attachment in §757(2) was not utilized by appellants, it provides that persons may be arrested without any notice at all. Any due process violations found in §757(1) are applicable to §757(2). Even if §757(2) were found to be constitutional, it is connected with & dependent upon the rest of the statutory structure. It is reasonable to assume that the legislature intended the statutory scheme to operate as a unit. Where a statute is partially invalid and is intended to operate as a whole, the entire statute must be struck down. *Hill v. Wallace*, 259 U.S. 44 (1922); *People v. Harrison*, 170 A.D. 802, 156 N.Y.S. 679 (1915), *aff'd.* 219 N.Y. 562, 114 N.E. 1076 (1916).

on Vail is set forth in full below.[10] The show cause order is insufficient because it does not explain the consequences of a contempt order. While appellants

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10 *At a Special Term Part of the* COUNTY *Court of the* STATE OF NEW YORK *held in and for the County of* DUTCHESS *at the Court House thereof on the* 22nd *day of* July, 1974

PRESENT *Hon.* JIUDICE

Index No.

PUBLIC LOAN COMPANY, INC.

Plaintiff

against

HARRY VAIL, JR. AND CHARLENE VAIL

Defendant

ORDER TO SHOW CAUSE TO PUNISH–JUDGMENT DEBTOR–WITNESS–FOR CONTEMPT

*On the subpoena, the affidavit of due service of said subpoena upon the judgment debtor (witness), * * *, all of which are hereto annexed, and upon the affirmation of* CHARLES P. MORROW, ESQ. *dated* JULY 19th, 1974 *by which it appears that the person subpoenaed failed to comply with said subpoena–stipulation–and upon the notation of default appearing thereon.*

IT IS HEREBY ORDERED, *that* HARRY VAIL, JR. *appear before me or one of the justices of the* COUNTY *Court of the* DUTCHESS *County of* STATE OF NEW YORK *at a* SPECIAL *Term. * * * to be held at the Court House at* MARKET STREET, POUCHKEEPSIE, NEW YORK *on the* 13th *day of* AUGUST 1974 *at* 9:30 *o'clock in the* fore *noon of that day and show cause why* he *should not be punished as for contempt for violation of and non-compliance with the said subpoena * * * in that* he *failed to appear or respond pursuant thereto, and why* he *should not pay the costs of this motion, and why the judgment creditor herein should not have such other and further relief as may be proper.*

Service personnally *of a copy of this order and of the papers upon which it is based, on the said* HARRY VAIL, JR. *on or before the* 3rd *day of* AUGUST 1974 *shall be deemed sufficient.*

Enter

Justice of the COUNTY COURT

contend that any person understands the meaning of 'contempt', the law of contempt is sufficiently complex to require clarification of the term. Contempt of court has been referred to as "... the Proteus of the Legal World, assuming an almost infinite diversity of forms". Moskovitz, *Contempt of Injunctions, Criminal and Civil*, 43 Colum. L. Rev. 780 (1943). Contempt may be criminal or civil, direct or indirect, and judicial or legislative. In *The Contempt Power*, Ronald Goldfarb aptly describes the significance of these classifications as follows:

> With each labeling of a given contempt, a different door is opened to a different legal arena and a new association of participating procedures and characteristics. These classifications go to the heart of an accused contemnor's liberty and property rights. The decision-maker's every treatment of a contempt case involves a kaleidoscope of legal procedures. One turn, one move of position causes a swirl of new and special legal relationships between government and the individual. This aspect of the law of contempt is as reasonable as Russian roulette. R. Goldfarb, *The Contempt Power* 48 (1963).

Section 757 violates the due process clause of the Fourteenth Amendment because it does not require notice that failure to appear at the show cause hearing might result in a deprivation of property and incarceration.[11]

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[11]The disclosure subpoena issued by a creditor's attorney pursuant to N.Y.C.P.L.R. §§5223 and 5224(a)(1) (McKinney 1963) also fails to provide notice that noncompliance may result in incarceration.

2. Due process requires that the show cause order warn debtors that failure to appear may result in loss of property and liberty.

Due process in civil proceedings generally requires that individuals be notified of the action proposed to be taken against them.[12] *Windsor v. McVeigh*, 93 U.S. 274 (1876). Thus, a summons must contain notice of the property sought in the action, *Grannis v. Ordean*, 234 U.S. 385, 397 (1914), and a default judgment may not be entered that exceeds the relief "... prayed for in the demand for judgment". Fed. Rule Civ. Proc. 54(c). Appellees contend that when the proposed action involves grievous consequences such as loss of property and liberty, persons must be notified of this possibility.[13] *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).[14]

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[12] *Blackmer v. United States*, 284 U.S. 421 (1932) cited by the appellants, supports this contention. There, Blackmer's property was seized when he was held in criminal contempt for noncompliance with a subpoena. The show cause order provided him with adequate notice that failure to appear would result in "... seizure of his property to be held to satisfy any judgment that might be rendered against him in the proceeding." *Id.* at 443.

[13] Judge Henry J. Friendly has noted that "It is ... fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it". Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280 (1975) (footnote omitted).

[14] While *Lynch* deals with individuals alleged to be under a mental disability, the requirements of due process are based upon the threat of confinement rather than the mental abilities of the patients. Appellants' contention that only a person under a disability is entitled to the kind of notice required by the three-judge court is not supported by *Covey v. Town of Somers*, 351 U.S. 141 (1956). *Covey* merely indicates that an incompetent is entitled to more notice than was required by Article VII A, Title 3 of the New York Tax Law, and says nothing about the requirements of due process regarding competent debtors faced with incarceration.

The timing and content of the notice required by due process depends upon the nature of the case, as well as the "... appropriate accommodation of the competing interests involved". *Goss v. Lopez*, 95 S. Ct. 729, 738-39 (1975).[15] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

An analysis of the nature of the case reveals that notice is required of the possibility of incarceration and deprivation of property. Incarceration and fines in civil contempt proceedings are imposed not as punishment but are "... intended to be remedial by coercing the defendant to do what he had refused to do". *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911). The threat of incarceration and fine make the proceedings effective. Notice of this threat is essential.

The competing interests of the creditor, debtor, and public are served by requiring clear and complete notice on the show cause order that failure to appear at the show cause hearing may result in incarceration and deprivation of property. Such notice serves the creditor's interest in obtaining information about debtor's assets by increasing the probability that the debtor attends the show cause hearing.[16] By encouraging attendance, clear and complete notice serves

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[15] *See generally* Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975).

[16] The creditor may not use the procedures to collect a money judgment. Other states statutes must be used to realize this objective. *See* N.Y. Domestic Relations Law §244, *Enforcement by execution of judgment or order in action for divorce, separation or annulment* (McKinney 1964); N.Y. Domestic Relations Law §243, *Security for payments by defendant in action for divorce, separation or annulment; sequestration*, (McKinney 1964); N.Y. Domestic Relations Law §233, *Sequestration of defendant's property in action for divorce, separation or annulment where defendant cannot be personally served*, (McKinney 1964); N.Y. Personal Property Law §49-b, *Wage*

(continued)

the debtor's interest in avoiding a fine or jailing for an indeterminate term that is erroneous or unwarranted.

Clear and complete notice on the show cause order serves the public interest by increasing the probability that debtors attend show cause hearings so that judges are provided with sufficient information to distinguish between contumacious and noncontumacious debtors. Incarceration of indigent debtors is against the public interest as evidenced by New York statutes which exempt public assistance grants,[17] and unemployment insurance benefits[18] from creditors' claims. New York enacted these exemptions to insure that public moneys

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(footnote continued from preceding page)
Assignment and deduction by court order in support cases (McKinney 1976); N.Y. Family Court Act §429, *Sequestration of respondent's property* (McKinney 1975); N.Y. Family Court Act §457, *Order of sequestration on failure to obey support order,* (McKinney 1975); N.Y.C.P.L.R. Article 61, *Arrest,* (N.Y. Laws 1976, c. 129) (McKinney's Sess. L. News 229), amending McKinney 1975, amending McKinney 1963; N.Y.C.P.L.R. Article 62, *Attachment,* (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §5231, *Income Execution* (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §§5232 and 5233, *Levy upon and sale of personal property,* (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §§5235 and 5236, *Levy upon and sale of real property* (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §5250, *Arrest of judgment debtor,* (McKinney 1963).

[17]N.Y. Social Services Law §137 provides "All moneys or orders granted to persons as public assistance or care pursuant to this chapter . . . shall be exempt from levy and execution under the laws of this state". N.Y. Social Services Law §137-a provides "All wages, salary, commissions or other compensation paid or payable by an employer to a person while he is in receipt of public assistance or care supplementary to his income . . . shall be exempt from assignment, income execution or from an installment payment order. . . ." (McKinney 1976).

[18]N.Y. Labor Law §595 states that "Benefits . . . shall be exempt from all claims of creditors and from levy, execution and attachment, or other remedy for receiving or collection of a debt. This exemption may not be waived". (McKinney 1965).

are used for necessities of life. *Consumer Creditor Corp. v. Lewis,* 63 Misc. 2d 928, 929, 313 N.Y.S. 2d 879, 880 (Nassau D.C. 1970). The exemptions intend to preclude the use of moneys to satisfy creditors' claims. *See Russo v. New York State Social Services Dept.,* 68 Misc. 2d 1094, 329 N.Y.S. 2d 13 (S. Ct. Monroe 1972). New York has a strong interest in insuring that debtors appear at show cause hearings and disclose their assets so that indigent debtors are not forced to utilize public assistance grants and unemployment insurance benefits to satisfy creditors' claims.

All interests are served by the debtor's attendance at the show cause hearing. As the harm suffered through inadequate notice is imprisonment and additional notice would impose no substantial burdens on the public or the creditor,[19] the show cause order must provide the debtor with notice that failure to appear at the show cause hearing might result in imprisonment and a deprivation of property.[20]

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[19]Specific notice requirements in other New York procedures have created no burdens on private litigants. N.Y. Domestic Relations Law §232 (McKinney 1975, amending McKinney 1964) provides that a divorce summons "... shall have legibly written or printed upon the face thereof: ... Action for Divorce." A summons in an action arising out of a consumer credit transaction "... shall prominently display at the top of the summons the words 'Consumer Credit Transaction.'" N.Y.C.P.L.R. §305(a) (McKinney 1975, amending McKinney 1972).

[20]Several states require that the notice ordering the judgment debtor to appear at the disclosure or show cause hearing contain a warning which states that failure to appear may result in incarceration. In California, for example, the disclosure notice must contain the following warning, "Failure to appear may subject the party served to arrest as punishment for contempt of court". West's Ann. C.C.P. §714 (1976). *See, e.g.,* Indiana: Burns Ind. Stat. Ann. §34-4-7-8 (1973); Maine: Me. Rev. Stats. Ann. 14 §3122 (1975); Oregon: Ore. Rev. Stats. §33.040 (1975); Rhode Island: *Mills v. Howard,* 109 R.I. 75, 280 A.2d 101 (1971); Washington: Wash. Rev. Code §7.20.040 (1961); West Virginia: W. Va. Code Ann. §62-6-6 (1975).

3. Due process requires clear and timely notice.

Clear notice of the consequences of the contempt order is required if the notice is to be "... reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[21] Alderman's study of New York civil contempt procedures indicates that the percentage of judgment-debtors who understand the nature of the order to show cause is miniscule. Only 18 out of 40 individuals interviewed understood what the show cause order meant. "Few if any of the persons interviewed understood why they had been fined, and none stated that they knew how to prevent it." Alderman, *supra* at 1239. Alderman has found that only 6.9% of the

[21]The difficulties encountered in understanding legal notices are not limited to show cause orders in civil contempt proceedings. David Caplovitz's study regarding the high rate of default judgments entered in New York reveals that only 4% of the defendants surveyed appeared in response to the summons. "Fifteen percent of the New York debtors ... told us that they did not know that they were supposed to appear in court, that, in short, they did not understand the meaning of the summons". D. Caplovitz, *Consumers in Trouble, A Study of Debtors in Default* 206 (1974). *See* Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 Colum. J. L. & Soc. Prob. 370, 385, n. 61 (1974). In F.T.C. Hearings on debt collection practices, Caplovitz stated that "... the language of the summons, especially in New York, virtually defies understanding and that even a well-educated person would have difficulty understanding the message of the summons". Federal Trade Commission, *New York Regional Office Staff Report of Debt Collection Hearings*, at 119 (1973) [hereafter cited as F.T.C. Report] . Other witnesses at the hearings, including an Assistant U.S. Attorney, indicated that the language of the summons should be changed "... to make it easier for the average laymen to understand what the consequences of his default will be, and what steps he should take to avoid default". *Id.* at 121.

judgment debtors appeared at the show cause hearing and concluded that "... the show cause hearing and its supportive procedures are ineffective to inform the low income debtor either of the reason for the punishment or of what steps he could take to alleviate it". Alderman, *supra* at 1229 and 1238. It is also significant that "[m]ost subjects interviewed in this study expressed a desire to cooperate with the judgment creditor and to satisfy this judgment as fast as feasibly possible". Alderman, *supra* at 1236. As the actual show cause order served on Vail, *supra* at n. 10, is not clear, it does not effectively apprise debtors of the pendency of the civil contempt proceedings.

While appellees were notified after they had been found in contempt that they would be incarcerated if they did not pay a fine, notice at this stage is inadequate. Once appellees received the contempt order, the statutory scheme provides no opportunity for a hearing prior to incarceration. Since the purpose of notice is to afford individuals "... an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950),[22] notice after the opportunity for a hearing elapses is ineffective and meaningless. Notice must be provided so the debtor can appear at the show cause hearing, "... when the deprivation can still be prevented". *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The three-judge court correctly decided that "Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment". (J.S.8a)

[22]Judge Friendly has noted that notice is necessary because "Otherwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided...". *Some Kind of Hearing, supra*, note 13, at 1280-81.

C. NEW YORK CIVIL CONTEMPT PROCEDURES VIOLATE AN INDIVIDUAL'S FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

1. Statutory Scheme

New York civil contempt procedures violate the due process clause of the Fourteenth Amendment to the United States Constitution by subjecting debtors to imprisonment without informing them of their right to counsel, or to assigned counsel if indigent. The right to counsel is essential when persons are threatened with incarceration and must defend themselves against loss of freedom in an adjudication of factual and legal issues. The denial of assigned counsel to appellee Rabasco confirms the absence of a right to assigned counsel (A.69a-70a).[23] In the absence of a statute, New York courts have no power to "... direct the provision of counsel or to require the compensation of retained counsel ..." *Matter of Smiley*, 36 N.Y. 2d 433, 330 N.E. 2d 63, 369 N.Y.S. 2d 87, 90 (1975).[24] Because

[23]Contrary to appellants' assertions (A.B. at 7), while appellee Rabasco retained Mid-Hudson Valley Legal Services Project to represent him in the instant case, he did not retain the Project to represent him in the state court proceedings. It is evident that federally funded legal services offices are physically and financially incapable of serving the needs of all indigents who require assigned counsel. *See* Stein, Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 Fordh. L. Rev. 989, 1000-01 (1975); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. Urban L. 217 (1969); Note: *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L. J. 545, 546 (1967).

[24]This construction of the statutes is confirmed by the legislature's express provision for advising persons of their right to counsel and providing assigned counsel for indigents in the analogous non-support situation in Family Court. *See* N.Y. Family Court Act §433 (McKinney 1975). *See also* N.Y. *(continued)*

the civil contempt procedures do not include a statutory requirement that counsel be assigned, there is no such right and the statutes are thus unconstitutional.

2. The assistance of counsel is required for a fair hearing when a debtor is threatened with incarceration.

A basic element of due process is the right to counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).[25] In *Argersinger v. Hamlin*, 407 U.S.

(footnote continued from preceding page)

Judiciary Law §35(1)(a) (McKinney 1975); N.Y. Family Court Act §§262(a)(i-vii); 1012(a) (McKinney 1975).

While appellants assert that *Rudd v. Rudd*, 45 A.D.2d 22, 356 N.Y.S. 2d 136 (4th Dept. 1974), holds that persons faced with civil contempt for failure to pay support are to be advised of their right to counsel and assigned counsel if indigent, a closer examination of the case reveals that there the court dealt with N.Y. Family Court Act §§433 and 454 rather than the civil contempt procedures in Article 19 of the Judiciary Law. *Walker v. Walker*, 51 A.D. 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976), also cited by appellants (A.B. at 27 & 28), does not deal with the right to counsel issue.

[25]Mr. Justice Sutherland summarized why counsel is required for a fair hearing as follows: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect". *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

25 (1972), this Court decided that ". . . no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial". 407 U.S. at 37. Counsel was found to be required for a fair trial because:

> (1) "[T]he average defendant does not have the professional legal skills to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is [re] presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938), cited in *Argersinger*, 407 U.S. at 32 n. 3;
>
> (2) The legal and constitutional questions involved in a case that leads to imprisonment for a brief period are no less complex than those that involve longer terms (*See* p. 23 *infra.*);
>
> (3) ". . . [I]mprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career or his reputation." *Baldwin v. New York*, 399 U.S. 66, 73 (1970), cited in *Argersinger*, 407 U.S. at 37.

These same considerations mandate the assignment of counsel in civil contempt proceedings where an individual's freedom is in jeopardy.[26]

An attorney is required to assemble and analyze the factual and legal considerations that are relevant to a

[26]"Counsel was recognized as an important element in civil causes early in English legal history." *The Right to Counsel in Civil Litigation*, 66 Colum. O. Rev. 1322, 1325 (1966). *See generally* Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923). Assigned counsel is generally required in civil commitment proceedings. *Bell v. Wayne County General Hospital at Eloise*, 384 F. Supp. 1085, 1092-32 (E.D. Mich. 1974); *Stamus v. Leonhardt*, 414 F. Supp. 439, 448 (S.D. Iowa 1976).

debtor's defense.[27] Because the proceedings are adversarial, an attorney's knowledge of procedure and

[27]The following are some of the defenses that may be raised:

(1) The individual did not intentionally disobey the subpoena. N.Y.C.P.L.R. 5251 (McKinney 1975);
(2) The individual's conduct was not calculated to and did not defeat, impair, impede, or prejudice the rights or remedies of a party to a civil action. *Matter of Bowling Ltd. v. Cramer*, 38 A.D. 2d 774, 327 N.Y.S. 2d 902 (3d Dept. 1972), *rev'd. on other grounds*, 41 A.D. 2d 996, 343 N.Y.S. 2d 1006 (3rd Dept. 1973);
(3) The subpoena was not served or was improperly served. *Carl v. Moyer*, 63 Misc. 2d 1052, 313 N.Y.S. 2d 936 (S. Ct. Onon. Co. 1970);
(4) The show cause hearing was commenced by a notice of motion. *Byrne v. Long Island State Park Commission*, 67 Misc. 2d 1084, 325 N.Y.S. 2d 147 (S. Ct. Nassau Co. 1971);
(5) The individual is unable to produce the information requested in the subpoena. *McPhaul v. United States*, 364 U.S. 372 (1960), *United States v. Bryan*, 339 U.S. 323, 330-31 (1950).

When the procedures are utilized pursuant to §770 to enforce orders of support or alimony, the following defenses may be raised:

(1) The divorce decree is ambiguous. *Goldstein v. Goldstein*, 47 A.D. 2d 744, 364 N.Y.S. 2d 552 (2d Dept. 1975);
(2) Visitation rights were denied. *Abraham v. Abraham*, 28 A.D. 2d 864, 281 N.Y.S. 2d 601, *aff'd.*, 22 N.Y. 2d 857, 293 N.Y.S. 2d 118, 239 N.E. 2d 743 (1968);
(3) The divorce decree is a foreign decree that cannot be enforced through New York civil contempt sanctions. *Cooperman v. Cooperman*, 62 Misc. 2d 745, 309 N.Y.S. 2d 683 (S. Ct. N.Y. Co. 1970);
(4) Payments can be enforced by sequestration of the husband's property. *Bernard v. Bernard*, 41 A.D. 2d 735, 341 N.Y.S. 2d 286 (2d Dept. 1973).

Appellants' reliance upon *Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974) (three-judge court) to support the notion that civil contempt proceedings are not complex is misplaced. In the context of New York law, the procedures are not clearcut or simple.

evidence is essential. The creditor is generally represented by an attorney and the initial subpoena must be issued by an attorney or other officer of the court pursuant to N.Y.C.P.L.R. §2302(a) (McKinney 1974). Section 757 provides that the order to show cause "... must be made returnable at a term of the court at which a contested motion may be heard". A formal evidentiary hearing may be held if factual issues arise at the motion term.[28] N.Y.C.P.L.R. §2218 (McKinney 1974). Laypersons cannot be expected to consider and evaluate the large number of factors that may be raised in their defense.[29] As debtors cannot obtain release on bail when the proceedings are initiated by a show cause order, the assistance of counsel is required. When individuals may be deprived of fundamental due process liberty interests, assigned counsel is required.

Appellants now concede that "[t]here may be cases where counsel should be assigned ..." (Appellants' Brief, hereinafter referred to as A.B., at 27) and assert that this decision "[s]hould be left to the discretion of

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[28]*See Pirrotta v. Pirrotta*, 42 A.D. 2d 715, 345 N.Y.S. 2d 619 (2d Dept. 1973).

[29]As Chief Justic Traynor noted in *In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) "The civil defendant cannot be expected to understand and to present the legal obligations that may be raised in testing the validity of the arrest order...." 69 Cal. 2d at 490. *See* Houle and Dubose, *The Nonsupport Contempt Hearing: Constitutional and Statutory Requirements*, 14 N.H.B.J. 165, 171-172 (1973); Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 Colum. J. L. & Soc. Prob. 370, 413 n. 208 (1974).

The Association of the Bar of the City of New York has consistently called for assigned counsel in civil consumer matters so that consumers are made aware of the defenses they have. 23 Ass'n. of the Bar of the City of New York, *The Right to a Day in Court and the Consumer Defendant* 586 (1968); 24 Ass'n. of the Bar of the City of New York, *The Right to Counsel in Civil Cases* 260 (1969). Former United States Attorney Whitney North Seymour has recommended an expanded right to counsel in civil consumer cases so that debtors can effectively present defenses. F.T.C. Report, *supra* note 21, at 133 & 140.

the state trial judge". (A.B. at 27) This concession constitutes an admission that the civil contempt statutes are unconstitutional as the statutes do not require a case-by-case approach to the assignment of counsel.[30]

Moreover, the case-by-case approach to the right to counsel is inadequate in light of the complex legal and factual questions involved in civil contempt proceedings, (*See* p. 23 *supra*), and the adversarial nature of the procedures. (*See* pp. 23-24 *supra*). These factors distinguish the instant case from *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), cited by appellants. There, a case-by-case approach to the assignment of counsel in parole revocation procedures was adopted because it was determined that "... the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings ..." 411 U.S. at 790. The presence of counsel was found to be undesirable because "[t]he role of the hearing body ... as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee". 411 U.S. at 787-88. Counsel was found to be unnecessary because: (1) the proceedings are informal and conducted without "... technical rules of procedure or evidence ..." 411 U.S. at 786-87; (2) the state is represented by a parole officer interested in the rehabilitation of the offender rather than a prosecutor or lawyer; and (3) the factual questions are simple as in "... most cases, the probationer or parolee has been

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[30]Illiteracy was one of the special circumstances used in deciding whether or not counsel should be appointed even prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Moore v. Michigan*, 355 U.S. 155 (1957). Although appellee Hurry is illiterate, counsel was not assigned for him. Appellants omitted pleadings regarding plaintiff Hurry from their Appendix. Those papers may be found in the record.

convicted of committing another crime or has admitted the charges against him". 411 U.S. at 787.[31] In the instant case, where the civil contempt proceedings are conducted before a judge, where complex rules of procedure and evidence are used, where creditors are generally represented by attorneys, and where complex legal and factual questions are presented, the case-by-case approach to the assignment of counsel is neither appropriate nor adequate.

3. The requirement of counsel in federal and most state civil contempt proceedings confirms the need for an attorney.

The development of the right to assigned counsel in federal courts confirms the conclusion that individuals need counsel to present their case and receive a fair hearing. In 1925, this Court noted that "[d]ue Process of law, therefore, in the prosecution of contempt, except of that committed in open court . . . includes the assistance of counsel . . ." *Cooke v. United States*, 267 U.S. 517, 537 (1925). *See also In Re Oliver*, 333 U.S. 257, 275 (1948). All circuits that have considered the question have concluded that assigned counsel is required in civil contempt proceedings where the alleged contemnor is faced with the threat of incarceration. *See In Re DiBella*, 518 F. 2d 955, 959 (2d Cir. 1975); *In Re Kilgo*, 484 F. 2d 1215, 1221 (4th Cir. 1973);

[31]As the issue in the instant case is whether assigned counsel should be required rather than whether counsel should be permitted in civil contempt proceedings, *Middendorf v. Henry*, 96 S. Ct. 1281 (1976), referred to by appellants, (A.B. at 27), is also not relevant here. There, counsel was not permitted in summary court-martial proceedings because counsel would "... turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military...." *Id.* at 1292.

United States v. Sun Kung Kang, 468 F. 2d 1368, 1369 (9th Cir. 1972).[32]

Most states have found that individuals are entitled to the assistance of counsel in the presentation of defenses in civil contempt proceedings,[33] or other civil proceedings[34] when they face possible deprivation of liberty. In *Tetro v. Tetro*, 86 Wash. 2d 252, 544 P. 2d 17 (1975), the court noted that

> We thus join the great majority of courts which have addressed the issue and hold that whenever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation. 544 P. 2d at 19-20. (footnote omitted)

Counsel is required to insure that only those debtors for whom the coercive sanction of incarceration is appropriate are jailed.

[32]In civil contempt actions to enforce voting rights under 42 U.S.C. §1971(f) (1974), persons are provided with assigned counsel "... learned in the law...".

[33]*See, e.g.*, Alaska: *Otton v. Zaborac*, 525 P.2d 537 (Alas. S. Ct. 1974); Colorado: *Losavio v. District Court In & For Tenth Jud. Dist.*, 182 Colo. 180, 512 P.2d 266 (1973); Massachusetts: *Sodones v. Sodones*, 314 N.E. 2d 906 (Mass. Sup. Jud. Ct. 1974); Oregon: Ore. Rev. Stats. §33.095(2) (1975); Pennsylvania: *Pennsylvania ex rel Brown v. Hendrick*, 220 Pa. Super. 225, 283 A.2d 722 (1971); Rhode Island: *Mills v. Howard*, 109 R.I. 59, 280 A.2d 101 (1971); Washington: *Tetro v. Tetro*, 86 Wash. 2d 252, 544 P.2d 17 (1975).

[34]*Abbit v. Bernier*, 387 F. Supp. 57, 62 n. 12 at 63 (D. Conn. 1974) (three-judge court), *Wright v. Crawford*, 401 S.W. 2d 47, 49 (Ky. Ct. App. 1966); *Perlmutter v. DeRowe*, 58 N.J. 5, 274 A.2d 283, 289 (Sup. Ct. 1971); *In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 151-52, 72 Cal. Rptr. 340 (1968).

4. Appellees did not waive their right to counsel by failing to appear at the show cause hearing.

Appellees' failure to appear at the show cause hearing does not constitute a waiver of their right to counsel. As this Court has noted in the context of a civil proceeding, "[w]e do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937). Appellees did not waive their right to counsel as they did not intentionally relinquish or abandon "...a known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Because New York civil contempt procedures do not require that persons be advised of a right to counsel, appellees' failure to request that counsel be assigned does not constitute waiver. "[W]here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (footnote omitted).

D. NEW YORK JUDICIARY LAW SECTIONS 756, 770, 773 AND 774 VIOLATE DUE PROCESS BECAUSE THEY PERMIT THE IMPOSITION OF PUNITIVE FINES IN CIVIL CONTEMPT PROCEEDINGS.

1. Statutory Scheme

Section 773 authorizes the imposition of a contempt fine in the amount of $250 plus costs without proof of actual loss or injury and provides that the fine shall be

collected and paid over to the aggrieved party.[37] Sections 756, 770, and 774 authorize the incarceration of debtors until they have performed the required act and paid the fine irrespective of their ability to pay the fine. These sections violate the due process clause of the Fourteenth Amendment to the United States Constitution by permitting punitive fines to be imposed in civil contempt proceedings in the absence of criminal procedural safeguards.[38]

2. Due process requires that civil contempt fines be coercive and compensatory and not punitive.

The purposes for imposing a fine or incarceration in a civil contempt proceeding are: (1) to compensate the party injured by the contumacious conduct, and (2) to coerce compliance with the court's mandate. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911),

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[37]Appellants contend that the first sentence of §773 which mandates a fine "sufficient to indemnify the aggrieved party" is constitutional. (A.B. at 28). However the first sentence of §773 is not separable from the remainder of §773 or the statutory scheme as evidenced by the use of the term "fine" in §§770 and 774. Therefore, the entire section must be invalidated. *Hill v. Wallace*, 259 U.S. 44 (1922); *People v. Harrison*, 170 A.D. 802, 156 N.Y.S. 679, *aff'd.*, 219 N.Y. 562, 114 N.E. 1076 (1916).

[38]It is undisputed that these proceedings are civil contempt proceedings as their primary purpose is a remedial one. All of the elements identified in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-449 (1911) which distinguish civil contempt from criminal contempt are present here:

(1) the punishment is remedial;
(2) the proceeding is part of a civil action;
(3) no right to jury trial is afforded the charged parties;
(4) costs are awared the complainant; and
(5) the relief requested is directed toward the complainant.

See Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 238 (1971).

Shillitani v. United States, 384 U.S. 364 (1966). The absence of a right to a jury trial and other criminal procedural safeguards is justified by these limited purposes. The fine is imposed to compensate the injured party rather than to punish the contemnor. *Gompers, supra* at 441. Incarceration is conditional and coercive and is justified by the contemnor's ability to comply with the court order to avoid incarceration or to obtain release. *Shillitani, supra* at 370-71.

Section 773 permits the imposition of a punitive fine by providing that:

> Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses,[39] and two hundred and fifty dollars in addition thereto . . .[40]

As the civil contempt fine ". . . must of course be based upon evidence of complainant's actual loss," *United States v. United Mine Workers of America*, 330 U.S. 258, 304 (1947), the fine authorized by §773 is impermissible in a civil contempt proceeding.

The fine is also not conditional. Pursuant to §§756, 770, 773, and 774,[41] individuals may be imprisoned

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[39]Costs and expenses include reasonable attorney fees. *People ex rel. Garbutt v. Rochester and State Line Railroad Company*, 76 N.Y. 294, 301, 14 Hun. 371, 376 (1879).

[40]Appellee Ward was fined $250 plus $20 for costs and expenses even though the underlying money judgment against him was $146.84.

[41]Section 774 provides in part:

> Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. (McKinney 1975).

until they perform the required act *and* pay the fine.[42] The statutes do not permit individuals to purge themselves of the contempt by compliance with the subpoena. Appellees could not end their sentence ". . . by doing what (they) had previously refused to do". *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911).[43]

Sections 756, 770, 773, and 774 permit the incarceration of debtors until they pay the fine imposed with no inquiry regarding the debtor's capability of paying the fine.[44] Incarceration through civil contempt procedures is not proper, unless the contemnor has the ability to comply with the court order. The ". . . justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order".[45] *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

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[42]Appellants' assertion that appellees are unwilling to comply with the original subpoenas, (A.B. at 22), is factually erroneous. The Orders of Contempt issued by appellants Aldrich and Juidice required payment of the fine and not compliance with the subpoena.

[43]Historically, in civil contempt ". . . if the violation is proved the wrongdoer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong." Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 169 (1908).

[44]All appellees were incarcerated because they were unable to pay the contempt fine. The maximum fine, without proof of actual loss, is $250 plus costs and expenses. A single person's maximum *monthly* welfare grant for all needs in Dutchess County is $225. *See* 18 N.Y.C.P.L.R. 352.1-3, 352.7. There is no statutory requirement that imprisonment occur only if the individual willfully refuses to pay the contempt fine.

[45]As stated in *In Re Nevitt*, 117 F. 448 (8th Cir. 1902) "[b]ut they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets". *Id.* at 461.

Incarceration without a finding that the contemnor has the ability to do the act and pay the fine[46] is not permissible in civil contempt proceedings.[47]

E. NEW YORK JUDICIARY LAW SECTIONS 756, 757, 770, 772, 773, 774, AND 775 VIOLATE DUE PROCESS BECAUSE THE DEBTOR IS NOT BROUGHT BEFORE THE COURT PRIOR TO A FINDING OF CONTEMPT AND IMPOSITION OF FINE OR INCARCERATION.

1. Statutory Scheme

Pursuant to §§770 and 772, the state court fined a debtor who failed to appear at the show cause hearing with no finding that the person willfully failed to appear. The court then directed that if the fine was not paid within a specified period of time, imprisonment without further notice would follow. Upon the failure to pay the fine and with no finding of willful refusal or ability to pay, the creditor's attorney obtained *ex parte*

[46]While all jailed debtors paid the fine to obtain release, they borrowed money from friends or relatives or used their welfare check, exempt from execution. *See* p. 17, *supra*. The abusiveness of this practice has been noted in *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) where the court stated:

> ...no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

[47]In many states incarceration is only permitted where the court makes a finding that the individual is able to comply. *See e.g., Noorthoek v. Superior Court*, 269 Cal. App. 2d 600, 609, 75 Cal. Rptr. 61, 67 (1969); *Yoder v. County of Cumberland*, 278 A.2d 379, 390 (Me. Sup. Ct. 1971).

warrants of commitment from the state courts as authorized by §756. Thus, fines and incarceration were imposed in *ex parte* proceedings without bringing the debtor before the court.[48] The three-judge court correctly found that §§756, 757,[49] 770, 773, and 774 violate the due process clause of the Fourteenth Amendment because they authorize incarceration "...on the basis of a creditor's affidavit of service and an ex parte proceeding". (J.S.7a). The court held that "[a] finding of contempt can be properly made only upon a hearing with both parties present. The defect is not cured by providing a hearing within 90 days of incarceration". (J.S.7a-8a).[50] (footnote omitted).

[48]Appellants cite the first sentence of 6 Weinstein-Korn-Miller, §5251.03 for the proposition that New York has a long standing policy against enforcing money judgments by contempt because it would be tantamount to imprisonment for debt. However, the second sentence of the treatise specifically notes that "[t]his policy does not apply to contemptuous conduct committed in the course of the enforcement of a money judgment...." *Id.* at 52-747.

[49]Use of §757(2) alone would not be constitutional as it fails to meet the notice, counsel, and fine deficiencies in the statutes. Similarly, the fact that some lower New York City courts cited by appellant have indicated that it is better to bring the debtor before the court by attachment does not eliminate the constitutional objections. None of these cases state that it is unconstitutional to make a finding of contempt in the absence of the debtor. They simply state it is better to have the person in court. Moreover, none of these cases address the notice or counsel questions.

[50]Contrary to appellants' assertions, (A.B. at 18-19), *Agur v. Wilson*, 498 F.2d 961 (2d Cir. 1974), *cert. denied*, 419 U.S. 1072 (1974), does not preclude the three-judge court's decision here. In that case, Agur had at least four different attorneys and presented one hundred motions in state court proceedings. The Second Circuit decided that under the facts of the case no substantial question of federal law was involved because Agur had many opportunities for a hearing.

2. Appellants concede that due process may require a hearing prior to incarceration.

Appellants now concede that "An interpretation of Judiciary Law §757 to obviate any constitutional problems would require a court to first follow §757(1) and then if there was no appearance proceed under §757(2)". (A.B. at 23). Appellants' suggestion would solve the constitutional problems in the statutes if due process protections were provided as follows: (1) assigned counsel when the procedure reached the §757(2) non-appearance stage and the debtor was threatened with incarceration; (2) adequate notice; and (3) compensatory fines.

3. Historically, persons were brought before a judge prior to a finding of contempt.

Historically, in civil and indirect contempts, a person was brought before the court to show cause why he should not comply with the court order. As noted in 4 Blackstone Commentaries, 286-87, cited in *Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968):

> [I]n matters that arise at a distance, and of which the court cannot have so perfect a knowledge, . . . if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt the attachment issues in the first instance.

The purpose of the writ of attachment was to bring the person before the court, not to punish him. As noted in 4 Blackstone Commentaries, 287, cited in *In Re Verdon*, 89 N.J. Law 16, 97 A. 783 (1916), it was

> . . . merely intended to bring the party into court; and when there he must either stand committed or put to bail in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt.

See Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 172 (1908).

4. Due process requires a hearing with both parties present prior to a finding of contempt and incarceration.

The three-judge court correctly required that debtors be brought before a court prior to a finding of contempt and incarceration to insure the fairness and reliability of the decision to imprison as a coercive mechanism. As the purpose of the proceeding is to coerce compliance with a private party's disclosure subpoena and compensate the party injured by the contumacious conduct, incarceration and fines are only effective if the debtor has the ability to do the required act. A hearing is required prior to incarceration to determine ". . . whether petitioner has in fact behaved in a manner that amounts to contempt . . ." and whether the debtor has the ". . . present ability to comply". *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1972).

A hearing is also required as *ex parte* affidavits are an unreliable basis for decision-making ". . . where credibility and veracity are at issue. . . ." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Factual and legal issues are not susceptible to documentary proof when they involve questions of intent such as whether: (1) the debtor has committed the offense charged and willfully disobeyed a subpoena; and (2) the offense was calculated to and did defeat the rights of a party. As this Court noted in *Mitchell v. W.T. Grant*, 416 U.S.

600, 617 (1974) "[t]he broad 'fault' standard is inherently subject to factual determination and adversarial input".

A hearing is needed to prevent erroneous jailings. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process. . . ." *Mathews v. Eldridge*, 96 S. Ct. 893, 907 (1976). The risk of error in the New York civil contempt statutory scheme is high when debtors are incarcerated without judicial inquiry to determine whether:

(1) the debtor believes that the fine has been paid or arranged to be paid, (*See* p. 41 *infra*);

(2) the debtor is unable to pay the fine;[51]

(3) the creditor has suffered actual loss;

(4) the debtor's assets are exempt from execution;

(5) the debtor received actual notice of the show cause and contempt order;[52]

(6) the debtor is able to read; or

(7) other mitigating circumstances are present.[53]

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975) this Court found the Georgia garnishment statutes unconstitutional because they did not provide for adequate procedures ". . . to guard against the risk of initial error". 95 S. Ct. at 723. In this case, ". . . only a hearing will elucidate all the facts

[51] In *Yoder v. County of Cumberland*, 278 A.2d 379, 386 (Me. Sup. Jud. Ct. 1971) the court noted that there is ". . . the need of an additional hearing as to *the reasons for nonpayment*, especially when the nonpayment can, as here, be the result of inability to pay".

[52] False affidavits of service and "sewer service" are problems in New York. F.T.C. Report, *supra* note 21, at 98-105. *See also* Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 Colum. L. Rev. 847 (1972).

[53] "Studies indicate that the great majority of contemnors who appear at show cause hearings are able to show some mitigating circumstances and avoid imprisonment." Alderman *supra* at 1229.

and assure a fair administration of justice".[54] *Harris v. United States*, 382 U.S. 162, 167 (1965).

The interests of the creditor, debtor, and public mandate that a judicial hearing occur prior to a finding of contempt and incarceration. The creditor has no special interests that preclude a prior hearing. In *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974), a prior hearing was not required when the creditor's interest in the sequestered property and the risk that the buyer would conceal or transfer the merchandise was coupled with the safeguards of a prompt post-seizure hearing and a bond requirement. In this case, the creditor has no interest in the debtor's body and does not use the procedures to prevent the debtor from damaging property.[55] There are also no safeguards as the creditor is not required to post any bond and a post-seizure hearing is required only after ninety days of incarceration. The creditor's interest in obtaining information about a debtor's assets is not served by the incarceration of a debtor who is indigent or who has no ability to produce the requested information. The creditor's interest in obtaining information is not

[54] One consequence of failing to require that the debtor be brought before the court is evidenced in the experience of appellees Nameth and Humes. Although temporary restraining orders were issued on January 8, 1975 by District Court Judge Thomas P. Griesa to prevent their arrest and incarceration, they were arrested and incarcerated on February 10, 1975, based upon *ex parte* warrants of commitment, in direct violation of the restraining orders.

[55] The civil contempt power is utilized to protect the rights and remedies of parties in civil actions, not to prevent debtors from leaving a jurisdiction or disposing of assets as are garnishment and attachment. *See North Georgia Finishing, Inc. v. Di-Chem. Inc.*, 95 S. Ct. 719, 724 (1975) (Powell, J., concurring). While summary procedure may meet due process requirements in extraordinary situations, such circumstances are not present here. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972).

hampered by requiring the attendance of both parties at a hearing prior to a finding of contempt. Because most consumer lawsuits result in default judgments, the hearing requirement is not overly burdensome to creditors.[56]

The debtor's liberty interest is served by a hearing prior to a finding of contempt and incarceration so that the severe consequences of incarceration may be avoided. In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), this Court recognized that "... prejudgment garnishment[57] of the Wisconsin type may as a practical matter drive a wage-earning family to the wall". 395 U.S. at 341-42. The consequences of incarceration are even more disruptive, particularly when debtors, such as appellees Thorpe (A.138a), and Harrell (A.145a), are arrested at their places of employment.

A hearing serves the public interest by insuring that debtors remain free from coercive civil contempt sanctions if they are unable rather than unwilling to comply. A hearing also insures that debtors will not be forced to use exempt income to pay creditor's claims.

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[56]All debtors in the instant case had default judgments entered against them in the underlying action. Ninety percent of the consumer suits brought in New York City Civil Court result in default judgments. A study of 23 New York City collection attorneys revealed that 15 of the 23 obtained default judgments in 100% of the actions they brought over a 3 month period. One attorney "... estimated that he instituted 7000 suits annually of which 90% resulted in defaults". F.T.C. Report, *supra* note 21, at 116, 164-165. *See Thompson v. Chemical Bank*, 84 Misc. 2d 721, 724, 375 N.Y.S. 2d 729, 734 (Civil Ct. City of N.Y. 1975); Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 Colum. J. L. & Soc. Prob. 370, 413 n. 208 (1974).

[57]Congress has recognized that garnishment "... frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden in interstate commerce". 15 U.S.C. §1671(a)(2) (1974).

(*See* p. 17 *supra*.) In many states, a finding of contempt can only be made when both parties are present.[58]

The experiences of Maine and Connecticut show that all interests are served by requiring a hearing prior to incarceration.[59] In *Desmond v. Hachey*, 315 F. Supp. 328 (D. Me. 1970) a three-judge court found §3505 of the Maine Debtor Disclosure Law to be violative of due process because it permitted:

> ... the arrest and incarceration, without a hearing,[60] of a judgment debtor who ha[d] failed to obey a subpoena for his appearance and examination at a disclosure hearing ... (315 F. Supp. at 333).

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[58]*See, e.g.*, Alaska: Alas. Civ. Rule 90(d); Arizona: *Ex Parte Quan*, 39 Ariz. 13, 3 P.2d 522 (1931); Arkansas: Ark. Stats. 1947 Ann. §28-514 (1962); California: West's Ann. C.C.P. §1217 (1976); Colorado: Colo. Rev. Stat., Rules of Civ. Proc. R. 107(c) (1953); Connecticut: *Remington Rand v. Typewriter Assemblers Lodge of International Ass'n. of Machinists*, 4 Conn. Supp. 150 (1936); Idaho: Idaho Code §7-609 (1947); Iowa: Code of Iowa §665.7 (1950); Maine: Me. Rev. Stats. Ann. 14 §3134-35 (1975); Massachusetts: Anno. Law of Mass., c. 224 §18 (1974); Minnesota: *Clausen v. Clausen*, 250 Minn. 293, 84 N.W. 2d 675 (1957); Minn. S. A. 38 §588.08 (1961); Montana: Mont. Rev. Code of 1947, Mont. Civ. Pro. 93-9809 (1964); North Dakota: No. Dak. §27-10-13 (1974); Oregon: Ore. Rev. Stats. §33.070 (1975); Rhode Island: *Mills v. Howard*, 109 R.I. 25, 280 A.2d 101 (1971); Utah: U.C.A. §78-32-9; 78-32-13 (1953); Washington: Wash. Rev. Code 7.20.40 (1961).

[59]Caplovitz has noted the similarities between the New York procedure and the former law in Maine:

> The tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison ... this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences had occurred in his area. D. Caplovitz, *Debtors In Trouble, A Study of Debtors in Default* 226 (1974).

[60]Appellants' assertion that *Desmond* is inapplicable, (A.B. at 24), is erroneous because the court in *Desmond* required a hearing rather than the mere opportunity for a hearing.

The court required a hearing because

> Such a drastic infringement upon personal liberty cannot be tolerated unless the procedure is hedged about with sufficient safeguards to assure that one who is innocent of any wrongdoing will not be punished.
> (315 F. Supp. at 333).

Statutes enacted after the *Desmond* decision provide that if the debtor fails to comply with a disclosure subpoena,[61] the court may issue a capias which authorizes the sheriff to arrest the debtor on a specific day and bring him before the court. The "... sheriff shall not incarcerate the judgment debtor but shall deliver the judgment debtor to the District Court". Me. Rev. Stats. Ann. 14 §3135 (1975). If the debtor does not show good cause for failure to respond to the subpoena, he may be ordered to pay the costs of issuing and serving the capias. Maine's new procedural safeguards insure that "... those debtors who can afford to pay are distinguished from those who cannot". Note, *Postjudgment Procedures for Collection of Small Debts: The Maine Solution*, 25 Maine L. Rev. 43, 53 (1973).

In Connecticut, a three-judge court declared the body execution statute, Conn. Gen. Stat. Ann. §52-369, unconstitutional on equal protection grounds and noted that the obvious cure was to "... provide hearings prior to incarceration to determine a debtor's ability to pay the judgment debt". *Abbit v. Bernier*, 387 F. Supp. 57, 62 (D. Conn. 1974).

[61]The disclosure subpoena contains the following warning: FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR ARREST. Me. Rev. Stats. Ann. 14 §3122 (1975).

5. Appellees' failure to appear at the show cause hearing does not constitute a waiver of their right to a hearing prior to incarceration.

Because civil contempt statutes provide for no notice that failure to appear may result in incarceration and no assignment of counsel, the failure to appear is not a clear waiver of rights. "[A] waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972). As the statutes permit incarceration without a finding that the debtor willfully refused to appear at the show cause hearing or pay a contempt fine, the failure to appear may not even be intentional. Alderman's study, confirmed by the experiences of appellees Vail (A.16a), Ward (A.21a), and Harvard (A.67a), indicates that most debtors fail to appear because they believe that they have arranged a settlement with the creditor's attorney so that no appearance is necessary. Alderman *supra* at 1238.[62] Many debtors also do not understand the show cause order. (*See* p. 19 *supra*). Individuals have a right to be present at contempt hearings unless this right is knowingly and intelligently waived.

6. The availability of a motion to vacate the contempt order under N.Y.C.P.L.R. §5015 does not cure the due process violations.

At the show cause hearing, the creditor must show to "... a reasonable certainty ..." that the debtor did not

[62]In the analogous default judgment situation Caplovitz's studies indicate that:

> ... the most common reason for not appearing in court was that the debtor ... presumably stimulated by the initiation of the law suit, has arranged for some kind of settlement with the creditor's attorney.... These debtors, where judgment was in fact entered, were under the mistaken impression that the court action was discontinued and they need not appear. (F.T.C. Report *supra note* 21 at 118).

comply with the subpoena. *Pereira v. Pereira,* 35 N.Y. 2d 301, 308, 361 N.Y.S. 2d 148, 154, 319 N.E. 2d 413, 418 (1974). Once the *ex parte* contempt order has been imposed, the burden of proof shifts and the debtor must present a valid excuse and meritorious defense to vacate the contempt order and obtain a hearing. *Gunther v. America Label Co., Inc.,* 243 A.D. 528, 275 N.Y.S. 861 (2d Dept. 1934); *Wall v. Bennett,* 33 A.D. 2d 827, 305 N.Y.S. 2d 728 (3rd Dept. 1969). After the debtor has been jailed, he has the burden to show inability to endure imprisonment. *Vought v. Vought,* 42 Misc. 2d 16, 247 N.Y.S. 2d 468 (S. Ct. N.Y. Co. 1964). A hearing must occur prior to the finding of contempt and concomitant shift in the burden of proof,[63] because "... the burden of proof ... may be decisive of the outcome". *Speiser v. Randell,* 357 U.S. 513, 525 (1958).

7. Section 775 does not vitiate the due process violations.

Although §775 authorizes release from incarceration in the discretion of the court upon proof of inability to pay the fine, it fails to provide for a *prior* hearing on the issue of indigency or impose a mandatory duty

[63]In *United States v. Wiseman*, 445 F.2d 792 (2d Cir.), *cert. denied,* 404 U.S. 967 (1971) professional process servers were convicted of filing false affidavits of service in the office of the Clerk of New York City Civil Court, which resulted in the entry of many default judgments without notice. The Second Circuit rejected the defendant's argument that persons could move to vacate the default judgments and cure the lack of notice. The court stated "... persons ... have a federal right ... to be accorded proper notice before the entry of judgments against them, since after judgment the burden is on defendant to seek such further relief as may be available." *Id.* at 797.

upon the court to release the indigent debtor. It also does not provide that the debtor be notified of the right to apply for release on account of indigency.[64]

8. The procedural due process protections in New York Family Court Act do not cure the deficiencies in Article 19 civil contempt proceedings.

The debtors' problems in the instant case did not involve support matters in Family Court. Therefore, the procedural protections in the Family Court procedure were not utilized.

According to the N.Y. Family Court Act, when a spouse files a support petition, a summons is issued requiring the respondent to appear. The summons generally contains a warning that failure to appear may result in the issuance of an arrest warrant. *Blouin v. Dembitz,* 489 F. 2d 488, 489 (2d Cir. 1973). If the respondent does not respond to the summons, the court may issue a warrant directing that he be arrested and brought before the court. N.Y. Family Court Act §428 (McKinney 1975). Once the Family Court issues a support order and the spouse fails to obey the order, the court may "... issue a warrant directing that the respondent be arrested and brought before the court". N.Y. Family Court Act §453 (McKinney 1975). If the respondent is arrested when Family Court is not in session, he must be taken before

[64]In declaring the California civil arrest statutes violative of due process, the California Supreme Court noted:

> The provision that the arrested defendant may apply to the court at any time before trial or judgment to vacate the arrest order or to reduce bail ... does not afford him a fair opportunity to challenge his imprisonment, for the Legislature has not required that he be given notice of his right to make the application. [*In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 151, 72 Cal. Rptr. 340, 343 (1968)].

a magistrate for arraignment. The magistrate may "... hold such respondent ... admit to, fix or accept bail, or parole him for hearing before the family court". N.Y. Family Court Act §155 (McKinney 1975). When the respondent is brought before the court, he is "... informed of the contents of the petition, advised of his right to counsel, and ... given an opportunity to be heard and to present witnesses". N.Y. Family Court Act §433 (McKinney 1975). N.Y. Family Court Act §262 (McKinney 1975) further provides that the judge shall inform the respondent of "... his right to have an adjournment to confer with counsel, and of his right to ..." assigned counsel if indigent.

Therefore, appellants' reliance upon cases dealing with the Family Court procedure such as *Blouin, supra,* and *Rudd v. Rudd,* 45 A.D. 2d 22, 356 N.Y.S. 2d 136 (4th Dept. 1974) is misplaced. Furthermore, the three-judge court decision had no effect upon the Family Court's ability to punish non-support cases by imprisonment. *See* N.Y. Family Court Act §156 (McKinney 1975).

9. Endicott-Johnson Corp. does not preclude the three-judge court's decision.

In *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.,* 266 U.S. 285 (1924), a writ of garnishment, issued without notice to a judgment debtor, was held to comport with due process. That decision is inapplicable to the requirements of due process where liberty interests are at stake.[65] As this case involves the jailing

[65]Appellants' reliance upon *Blackmer v. United States*, 284 U.S. 421 (1932) is misplaced for similar reasons. In that case, Blackmer was fined for noncompliance with a subpoena. An individual facing incarceration requires more elaborate due process protections than an individual subject to a deprivation of property.

of debtors rather than the garnishment of wages, due process must attach. U.S. Const. Amend. 14 §1.[66]

Endicott-Johnson Corp. also deals with mechanisms to enforce judgments rather than civil contempt proceedings. The satisfaction of a judgment is a mechanical step that may not require additional fact finding. As a supplementary proceeding, civil contempt procedures do require an adjudication of new factual and legal issues prior to incarceration. *Desmond v. Hachey,* 315 F. Supp. 328, 332 (D. Me. 1970); *Yoder v. County of Cumberland,* 278 A. 2d 379, 387 n. 5 (Me. Sup. Jud. Ct. 1971).

Finally, *Endicott-Johnson Corp.* must be viewed in light of the expansion in the scope of due process that has occurred since 1924. As early as 1946, this court found in *Griffin v. Griffin,* 327 U.S. 220 (1946) that due process required post-judgment notice. The court decided that before proceedings are initiated to enforce a divorce decree,

> ... further notice of the time and place of such further proceedings, [is required] inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not. (327 U.S. at 229).

This Court's decisions in *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 95 S. Ct. 719 (1975) indicate that procedures are required "...to prevent unfair and mistaken deprivations of property". *Fuentes, supra* at 97. The same rationale requires the application of due process protections to post-judgment

[66]While a judgment may put a debtor on notice that further steps may be taken "... to reach his property in satisfaction of the judgment," *Endicott, supra* at 288, it does not put a debtor on notice that he may be subject to incarceration.

proceedings,[67] where deprivation of liberty is involved. As one commentator has noted "... the mere possibility of an invalid seizure in the post-judgment area should call for notice and hearing". Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing*, 21 So. Dak. L. Rev. 78, 96 (1976).

F. CONCLUSION

The three-judge court correctly determined that the danger of error where incarceration is possible requires substantial procedural protections. In 1898, the use of body execution in debt collection was condemned as follows:

> The method charged upon this man is that he instituted such writs by the hundred in trying to collect debts; ... In most cases the debtor, who did not understand the perils of an action in tort, paid no attention to the suit and let judgment go against him by default. Then, armed with an execution which ran against the body the lawyer proceeded to make it quite unpleasant for the defendant, and of course in many cases extorted money from parties, who thought commitment to jail inconvenient and undesirable. This practice, whether or not carried on by this man, who denies it, is said to be not infrequently used by miscreants who get into the profession. Can we purge the community of such offenses by

[67] In *Brown v. Liberty Loan Corp. of Duval*, 392 F. Supp. 1023 (M.D. Fla. 1974) the court applied due process to post-judgment garnishment because "... the notice provided in initially obtaining the judgment does not serve to provide sufficient constructive notice of the issuance of the writ of garnishment for purposes of procedural due process." *Id.* at 1037.

> occasionally hunting down a shining example of wickedness and disbarring him? We think a more comprehensive remedy should be sought. [Robinson, *Attachment of the Body Upon Civil Process*, 4 Yale L. J. 295 (1898)].

The comprehensive remedy provided by the three-judge court should be affirmed.

II.

THE THREE-JUDGE COURT CORRECTLY ENJOINED THE USE OF PROCEDURALLY UNCONSTITUTIONAL CIVIL CONTEMPT STATUTES.

A. INTRODUCTION

The three-judge court properly issued orders to restrain the use of civil contempt statutes because:

(1) the state court remedy is inadequate;

(2) comity and federalism demand intervention, not deference to private litigants;

(3) non-intervention would impose an unwarranted limitation on federal court power;

(4) the statutes are flagrantly and patently unconstitutional; and

(5) the creditors utilized the statutes in bad faith.

As appellees Vail and McNair sought only damages, no injunctions issued as to them. When considering the propriety of injunctive relief, each appellee must be viewed separately. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975).

B. INTERVENTION IS APPROPRIATE AS THE STATE COURT REMEDY IS INADEQUATE.

The inadequacy of the state court remedies renders imperative the availability of the federal forum.[68] *See generally Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975). The remedies are inadequate because the highest court in New York has decided that it does not have the power to require public compensation of assigned counsel for indigents even if a constitutional right to counsel exists. In *Matter of Smiley*, 36 N.Y. 2d 433, 330 N.E. 2d 53, 369 N.Y.S. 2d 87 (1975), the court stated:

> There are no . . . statutory provisions to cover public provision or compensation of counsel in private litigation. Nor under the State Constitution may the courts of this State arrogate the power to appropriate and provide funds . . .
>
> * * * *
>
> The appropriation and provision of authority for the expenditure of public funds is a legislative and not a judicial function, both in the Nation and in the State. It is correlated, of course, with the taxing power (see N.Y. Const., art. XVI, §1; U.S. Const., art. I §8, cl. 1). (36 N.Y. 2d at 438-439; 330 N.E. 2d at 56; 369 N.Y.S. 2d at 91-92).

Appellees were therefore effectively foreclosed from asserting in state court a cornerstone of their contention under the due process clause: that they should not face the threat of incarceration without assigned counsel. As New York courts are bound by principles of *stare decisis* to follow the rulings of the

[68]The deficiencies in the state court remedies distinguish this case from *Cousins v. Wigoda, application for stay denied*, 409 U.S. 1201 (1972) (Rehnquist, Circuit Justice) where there was no challenge to the adequacy of the state court procedures.

New York Court of Appeals, the debtors were precluded from obtaining relief in state court on their right to assigned counsel claim.

C. COMITY AND FEDERALISM DEMAND INTERVENTION IN CIVIL CONTEMPT PROCEEDINGS, NOT DEFERENCE TO PRIVATE LITIGANTS.

While comity requires deference to state criminal law enforcement,[69] *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), comity does not require the same deference to procedurally unconstitutional state court civil contempt statutes.[70] *Joiner v. City of Dallas*, 380 F. Supp. 754,

[69]Historically, while the ban against intervention in criminal proceedings has been strict, many implied exceptions to 28 U.S.C. §2283 (1965) have been developed by this Court in civil matters. *French v. Hay*, 89 U.S. 250 (1874); *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880); *Marshall v. Holmes*, 141 U.S. 589 (1891). *See generally Mitchum v. Foster*, 407 U.S. 225, 235 (1972). If the original Anti-Injunction Statute of 1793 was passed as part of the "... then prevailing prejudices against equity jurisdiction," as suggested by commentators, the statute was not intended to include injunctions of civil proceedings. Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1171 (1933). *See also Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 130-32 (1941).

[70]Lower courts have found intervention in state civil proceedings appropriate where the adequacy of the state court procedures were challenged. *See Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974) (three-judge court); *Desmond v. Hachey*, 315 F. Supp. 328 (D. Me. 1971) (three-judge court); *Owens v. Housing Authority of City of Stamford*, 394 F. Supp. 1267 (D. Conn. 1975).

In *New Haven Tenants' Representative Council, Inc. v. Housing Authority of the City of New Haven*, 390 F. Supp. 831 (D. Conn. 1975) the court noted that "*Gibson* indicates that comity considerations need not dissuade a federal court from acting where the state court's proceedings will not afford the plaintiffs due process of law." *Id.* at 832-33.

759 (N.D. Tex.) (three-judge court), *aff'd. mem.*, 420 U.S. 1042 (1974).

When a state initiates a criminal prosecution or a proceeding in aid of and closely related to criminal statutes, deference and non-interference is mandated. First, as Mr. Justice Stewart noted in his concurring opinion in *Younger v. Harris*, 401 U.S. 37 (1971), "[a] State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law." 401 U.S. at 55 n. 2. Second, a pending state court criminal prosecution "... provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights[,]" *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) for the following reasons:

> (1) the defendant has a right to counsel and assigned counsel if indigent, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1972);
>
> (2) the prosecution is invoked upon a "... fair and reliable determination of probable cause ..." *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), and;
>
> (3) the criminal process is "... an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." 420 U.S. at 125, n.27.

None of the assumptions underlying the doctrine of non-interference in state criminal proceedings exist in civil[71] contempt proceedings. Criminal proceedings

[71]The civil contempt procedures are clearly civil proceedings even though they utilize incarceration. §753 is entitled "Power of courts to punish for civil contempts" and defines civil contempt as "... misconduct, by which a right or remedy of a party to a civil action or special proceeding ... may be defeated...." New York courts have historically and consistently viewed civil contempt as civil and have distinguished it from criminal contempt. In *People v. Oyer*, 101 N.Y. 245, 4 N.E. 259 (1886), the New York Court of Appeals noted that the

(continued)

vindicate public concerns, while civil proceedings focus on private relationships. In the instant case, private citizens used the statutes to obtain remedial relief when debtors did not respond to disclosure subpoenas.[72] Incarceration may be ordered after a finding of willful disobedience of the disclosure subpoena, with no finding of willful disobedience of a court order. The state is not a party to the proceedings. The procedures are not related to the enforcement of state criminal laws as in *Huffman*.[73] Neither the state nor the public

(footnote continued from preceding page)

distinction between civil and criminal contempt is "exhaustive and clear." While civil contempt involves the "vindication of private rights", criminal contempt involves "a violation of the rights of the public." *Id.* at 247-48, 4 N.E. at 259-60. *See also King v. Barnes*, 113 N.Y. 476, 21 N.E. 182 (1889).

Matter of Carlson v. Podeyn, 12 A.D. 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961) and *Dwyer v. Town of Oyster Bay*, 28 Misc. 2d 852 217 N.Y.S. 2d 392 (Sup. Ct. Nassau Co. 1961), cited by appellants, (A.B. at 13), do not hold to the Contrary. *Matter of Carlson* notes that punishment for contempt may involve loss of liberty and *Dwyer* appears to deal with a criminal contempt proceeding.

[72]"The offense to state interests is likely to be less in a civil proceeding." *Younger v. Harris*, 401 U.S. 37, 55 n.2 (1971). *See also The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 201, 217 (1972); Note, *Younger Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U.L. Rev. 870 (1975).

[73]This factor distinguishes this case from those in which the civil proceedings were used in connection with criminal law enforcement, *Duke v. Texas*, 477 F.2d 244 (5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974) or where injunctions were issued regarding internal police procedures. *Rizzo v. Goode*, 423 U.S. 362 (1976). In *Lessard v. Schmidt*, 421 U.S. 957 (1975), *on remand* No. 71 C602 (E.D. Wis. May 28, 1976) the court held that *Huffman* permitted intervention where the civil commitment statutes were not in aid of or closely related to criminal statutes, and stated that "[n]o crime must be committed for commitment, nor does the statute require a showing that the patient is a danger to society." *Id.* at 3.

has any independent interest in the information sought, the punishment, or the incarceration of the debtor. Only private interests are protected by the civil contempt statutory scheme.[74]

While elaborate procedural protections surround criminal prosecutions, not even minimal safeguards exist in civil contempt proceedings[75] which may also result in incarceration.[76] Civil contempt proceedings may commence by the service of a summons by a private party in the underlying action,[77] not after a determination of

[74] In *Doe v. Maher*, 422 U.S. 391 (1975), *on remand*, 414 F. Supp. 1368 (D. Conn. 1976) (three-judge court) the court decided that intervention was appropriate in civil contempt proceedings because "[r]ather than a criminal prosecution, the action is instead more in the nature of a civil debt collection." *Id.* at 1373.

[75] Appellants' reliance upon *Walker v. Birmingham*, 388 U.S. 307 (1967) is misplaced. *Walker* stands for the proposition that one may not willfully disobey a court order and then seek to challenge the underlying substantive statute in criminal contempt proceedings when the constitutionality of the substantive statute may be tested before disobeying the court order. *See United States v. Ryan*, 402 U.S. 530, 532 n.4 (1971). *Walker* does not deal with a direct challenge to the constitutionality of civil contempt procedures. In *Emergy Air Freight Corp. v. Local Union 295*, 449 F.2d 586 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972) the court distinguished *Walker* on this basis and held that the contempt order had to be set aside because "... the finding of contempt in the Final Contempt Order and fine were both imposed without proper regard for ... procedural rights...." *Id.* at 592.

[76] The threat of incarceration distinguishes the instant case from *Lynch v. Snepp*, 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) where the court noted that "... requiring the plaintiffs to first seek vindication of their rights in the pending state court proceeding will not expose them to the risk of possible loss of liberty." *Id.* at 778.

[77] The "[c]ontempt proceedings are taken in the action itself, and do not constitute a separate special proceeding." *Drinkhouse v. Parka Corp.*, 3 N.Y. 2d 82, 90, 143 N.E. 2d 767, 771, 164 N.Y.S. 2d 1, 7 (1957). *See also Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911).

probable cause by a state official. Intervention is appropriate where the only state remedy is the challenged statutes. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973). Comity and federalism do not require deference to permit private litigants to utilize constitutionally deficient procedures.

D. NON-INTERVENTION WOULD IMPOSE AN UNWARRANTED LIMITATION ON FEDERAL COURT POWER.

The consequences of applying the non-interference doctrine to civil contempt proceedings will not serve the interests of state and federal governments. Private citizens will be able to bar federal court involvement in consumer matters and determine the power and business of federal courts by the simple service of a state court summons.

If injunctive relief is barred in pending civil proceedings, the scope of 42 U.S.C. §1983 (1970) is seriously undercut.[78] In *Mitchum v. Foster*, 407 U.S. 225 (1972), this Court determined that §1983 came within the "expressly authorized" exception of the anti-injunction statute because it was "... an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, (which) could be given its intended scope only by the stay of a state court proceeding". 407 U.S. at 238. The purpose of §1983 was to "... interpose the federal courts between

[78] No person will have standing to obtain injunctive or declaratory relief before the civil proceeding begins. As one commentator has noted, "... the plaintiff must be able to assert the deprivation of a federally protected right to establish standing, and in a civil case not involving the state this may be impossible." Elsberry, *The Anti-Injunction Statute: A Damoclean Sword Blunted, Sharpened, Broken And...!* 22 J. Pub. L. 407, 428-29 (1973).

the States and the people, as guardians of the people's federal rights . . ." 407 U.S. at 242. This purpose is defeated if injunctions against pending state court civil proceedings are barred.[79]

E. INTERVENTION IS APPROPRIATE WHERE STATUTES ARE FLAGRANTLY AND PATENTLY UNCONSTITUTIONAL.

The three-judge court properly intervened because the civil contempt statutes are ". . . flagrantly and patently violative of express constitutional prohibitions . . ." *Watson v. Buck*, 313 U.S. 387, 402 (1941); *Younger v. Harris*, 401 U.S. 37, 53 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975). To be incarcerated by default, *in absentia* and without the assistance of counsel is antithetical to basic due process.

F. INTERVENTION IS APPROPRIATE WHERE CREDITORS USED CIVIL CONTEMPT STATUTES IN BAD FAITH.

If this Court finds intervention inappropriate, this case should be remanded to the three-judge court for a determination that the creditors used the civil contempt statutes in bad faith. *See generally Dombrowski v. Pfister*, 380 U.S. 479 (1965). The statutes are intended to coerce debtors, through fines and incarceration, to disclose information about their assets. With respect to

[79]It has been noted that "[i]f that rule were applied, much of the rigidity of §2283 would be reintroduced, the significance of *Mitchum* for those seeking relief from state civil proceedings would largely be destroyed, and the recognition of §1983 as an exception to the Anti-Injunction Statute would have been a Pyrrhic victory." *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 201, 217-18 (1972). This Court has stated that repeals of statutes by implication are not favored. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972).

appellees Vail,[80] Ward, and Harvard, creditors used the procedures to collect fines from indigent debtors who had disclosed information about their assets to the creditor and whose assets were exempt from creditors' claims under New York law. *See* p. 17 n.17 *supra.*

Appellee Ward provides one example of bad faith use of the statutes. Ward appeared pursuant to a disclosure subpoena at the appointed time and place. (A.20a). The creditor's attorney, Jeffrey Graham, did not appear. (A.21a). After a court clerk phoned Graham to inform him that Ward had appeared, Graham instructed Ward on the telephone to come to his office. (A.21a). Ward went to the office. He told the lawyer he would produce the information at the court, as the subpoena ordered him to appear in court, but he would not produce the information in the attorney's office. (A.21a). On May 15, 1974, Ward was served with a notice of motion for order to find him in contempt of court, which ordered him to appear in court on May 28, 1974, and he did not appear. (A.45a). In June 1974, Ward contacted the creditor's attorney and arranged to pay $10 a week to the attorney to satisfy the judgment (A.21a). On July 4, 1974, Ward lost his job and notified the attorney that he would not be able to continue making the payments. (A.21a). The attorney became angry and told him "I'll get the money from you one way or another". The contempt motion was adjourned to July 16 and July 23, 1974 and Ward did not appear. (A.45a). On October 1, 1974, Ward passed the attorney in the street and the attorney stated: "Some people don't pay their bills and are going to jail". (A.46a). On October 3, 1974, Ward was served with an order of contempt requiring him to pay $250

[80]The cases of Vail and Harvard are outlined at A.16a-18a and A.64a-68a, respectively, and will not be summarized here.

plus costs and attorneys fees within 30 days or be subjected to incarceration until the fine was paid. (A.22a). (The underlying judgment against Ward was for $146.84.) (A.20a). At that time, Ward's sole source of income was unemployment insurance benefits (A.23a), exempt from creditor's claims pursuant to N.Y. Labor Law §595 (McKinney 1965). These allegations are uncontroverted as defendant Goran never answered the complaint. On November 6, 1974, U.S. District Judge John M. Cannella issued a temporary restraining order to prevent the arrest and incarceration of Ward. (A.50a).

III.

THE THREE-JUDGE COURT CORRECTLY DECIDED TO RULE ON THE ISSUES IN THIS CASE AND NOT TO ABSTAIN.

New York's civil contempt statutes were enacted in 1909, have been construed by state courts, and are not ambiguous on their face. The New York Court of Appeals has upheld the constitutionality of the statutes. *Reeves v. Crownshield,* 274 N.Y. 74, 8 N.E. 2d 283 (1937); *In Re Barnes,* 204 N.Y. 108, 97 N.E. 508 (1912). Abstention is not warranted. As this Court noted in *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), "... the naked question ... is whether that Act on its face is unconstitutional ... Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim". 400 U.S. at 439.

An analysis of the civil contempt statutes reveals that "... no reasonable interpretation ... would avoid or modify the federal constitutional question ..." *Procunier v. Martinez,* 416 U.S. 396, 404 (1974). Section 757 fails to require that the show cause order

or warrant of attachment contain a warning that failure to appear may result in incarceration. *See* p. 13 *supra.*[81] No New York court has interpreted §757 as requiring notice that would avoid the constitutional deficiencies.[82] Section 773 permits the imposition of a fine of up to $250 and costs when no actual loss or injury has been shown. Appellants do not dispute this interpretation of the statute. *See e.g., Matter of Guyet Const. Corp.,* (Sup. Ct. N.Y. Co. August, 1976), in N.Y.L.J. Sept. 2, 1976, at 5, col. 2. *Busch v. Berg,* 384 N.Y.S. 2d 301 (4th Dept. 1976); *Joseph Riedel Glass Works, Inc. v. Kurtz & Co., Inc.,* 287 N.Y. 636, 39 N.E. 2d 276 (1941). Neither the statutes nor case law provides that individuals be notified of their right to counsel and assigned counsel if indigent. *See* p. 21 *supra.* Sections 756, 757, 770, 773, and 774 permit a finding of contempt and order of imprisonment without an actual hearing.[83] In *Darbonne v. Darbonne,* 85 Misc. 2d 267, 379 N.Y.S. 2d 350 (Sup. Ct. Kings Co. 1976) the court confirmed that *ex parte* commitment orders were generally issued in Kings County. Aside from New York City Civil Court, a hearing is generally required only where affidavits reveal factual disputes. *Pirrotta v. Pirrotta,* 42 A.D. 2d 715, 345 N.Y.S. 2d 619 (2d Dept.

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[81] Appellants did not question this interpretation in the district court. (See Defendant's District Court Brief at 20). While appellants now contend that the statute does not prohibit notice of incarceration, they do not dispute that the statute does not require such notice.

[82] *Walker v. Walker*, 51 A.D. 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976), referred to by appellants, dealt with N.Y. Domestic Relations Law §245 and not §757. After and based upon the three-judge court decision, a New York City lower court, in *Darbonne v. Darbonne*, 85 Misc. 2d 267, 379 N.Y.S. 2d 350 (Sup. Ct. Kings Co. 1976) found the statutory scheme for contempt proceedings pursuant to N.Y. Domestic Relations Law §245 unconstitutional.

[83] At the district court, appellants did not dispute this interpretation and asserted that due process did not require that debtors be brought before a judge prior to incarceration.

1973).[84] Section 774 indicates that the first time the contemnor must personally appear before the court is 90 days after the incarceration commences. *See generally People ex rel. Oppenheimer v. Rosoff*, 82 Misc. 2d 199, 368 N.Y.S. 2d 969 (Sup. Ct. N.Y. Co. 1975).

Because the statutes are inter-related and not separable, they must be viewed as a statutory scheme. *See* cases cited p. 12 note 9 *supra*. No New York court has construed the statutes to require adequate notice, assigned counsel, compensatory fines, *and* a hearing prior to incarceration. This fact distinguishes the case from *Carey v. Sugar*, 96 S. Ct. 1208, 1210 (1976), where this Court abstained because New York courts had construed N.Y.C.P.L.R. §6223 (1963) to require an adequate hearing. The three-judge court correctly decided not to abstain, noting that "... defendants [have not] suggested a limiting construction by which a state court could resolve the constitutional claim". (J.S.5a).

Appellants now contend in their brief[85] that abstention is warranted because some New York City lower courts have held that it is the "better procedure" to initiate the proceedings by the writ of attachment. *See Uni-Serv Corp. v. Linker*, 62 Misc. 2d 861, 311 N.Y.S. 2d 726 (Civil Ct. City of N.Y. 1970). The "better procedure" does not obviate the constitutional deficiencies relating to notice, counsel, and the fine and is not mandated by the statutes. The "better procedure" does not warrant abstention.

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[84]Even where affidavits reveal factual disputes, a hearing may not be granted if the affidavits are based upon hearsay. *Frigidaire Division, General Motors Corp. v. Sunset Appliance Stores, Inc.*, 46 A.D. 2d 616, 359 N.Y.S. 2d 789 (1st Dept. 1974).

[85]Appellants did not suggest a limiting construction to the three-judge court or to this Court in their Jurisdictional Statement. Question #2, (A.B. at 2), was not raised in the Jurisdictional Statement.

Abstention also should not be invoked in light of the delay and irreparable injury that will occur if the constitutional adequacy of the civil contempt statutes is not resolved. *Zwickler v. Koota*, 389 U.S. 241, 252 (1967). In *Bellotti v. Baird*, 96 S. Ct. 2857 (1976), this Court noted that:

> The practice of abstention is equitable in nature, *see Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 500-501, 61 S. Ct. 643, 645, 85 L. Ed. 971, 974-975 (1941), and it would not be improper to consider the effect of delay caused by the State's failure to suggest or seek a constitutional interpretation, Cf. *Baggett v. Bullitt*, 377 U.S. 360, 379, 84 S. Ct. 1316, 1326, 12 L. Ed. 2d 377, 389 (1964). (96 S. Ct. at 2864 n.10).

The appellants presented no limiting construction of the statutes to the three-judge court that would avoid the constitutional deficiencies. As the interpretations now suggested do not cure the constitutional deficiencies, they should not be permitted to delay the resolution of this serious consumer problem in New York.[86]

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[86]The problem has been recognized by the New York State Consumer Protection Board in their Amicus Curiae Brief and the New York State Legislature. On June 29, 1976, the New York State Legislature passed Assembly Bill No. 10319/Senate Print No. 12063 to amend the civil contempt laws. The Memorandum which accompanied the bill notes that its purpose was to "... conform to due process standards the procedure set forth in Article 19 of the Judiciary Law for punishment of civil contempts of courts". The bill was recalled on July 20, 1976 by the sponsor. Exhibit #5–Assembly Bill No. 10319/Senate Print No. 12063 and Memorandum.

IV.

THE THREE-JUDGE COURT DECISION IS CONSISTENT WITH REQUIREMENTS OF FULL FAITH AND CREDIT AND RES JUDICATA.

A. U.S. SUPREME COURT RULE 15(1)(c) BARS CONSIDERATION OF APPELLANTS' RES JUDICATA AND FULL FAITH AND CREDIT ARGUMENTS.

This Court should not consider the third question raised in appellants' brief regarding full faith and credit and *res judicata*, (A.B. at 2), as that question was not set forth in appellants' Jurisdictional Statement. U.S. Supreme Court Rule 15(1)(c), 28 U.S.C.A. (1976) states that "[o]nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court". *See also* U.S. Supreme Court Rule 40(1)(d)(2), 28 U.S.C.A. (1976), *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).[87]

B. THE THREE-JUDGE COURT DECISION IS CONSISTENT WITH NEW YORK STATE RES JUDICATA.

Pursuant to the U.S. Constitution Art. 4 §1, and 28 U.S.C. §1738 (1966), a federal court may give a state judgment the same effect it would have in state courts. In the civil contempt proceedings, state courts issued contempt orders and warrants of commitment. They did not issue judgments. In New York, principles of *res*

[87]While appellants mentioned the words full faith and credit and *res judicata* in their Motion to Dismiss (A.164a), they never briefed or otherwise presented those issues to the three-judge court.

judicata do not apply to orders made on motions. *See Riggs v. Pursell*, 74 N.Y. 370, 378 (1878); *Hill v. United States*, 298 U.S. 460, 466 (1936). Therefore, the three-judge court was not bound to give *res judicata* effect to the state court orders.

C. THE THREE-JUDGE COURT DECISION IS CONSISTENT WITH FEDERAL RES JUDICATA.

Even if New York courts would give *res judicata* effect to the state court orders, federal courts are not bound to state interpretations of *res judicata* if other important federal policies are involved. *American Mannex Corp. v. Rozands*, 462 F. 2d 688 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972). Where state court procedures violate federal constitutional rights to counsel and procedural due process, principles of *res judicata* do not preclude federal action. *See Ney v. California*, 439 F. 2d 1285 (9th Cir. 1971). *See also* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 U. Va. L. Rev. 250, 276-77 (1974).

When procedural due process violations are alleged, the Second Circuit has indicated that the question is "... whether the appellant has 'waived' his constitutional rights" rather than whether *res judicata* applies. *Lombard v. Board of Education*, 502 F. 2d 631, 636 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975). The court noted that "[i]t is not quite fair to say that he 'waived' his right to assert in the administrative agency itself that the process afforded was not 'due process' ". 502 F. 2d at 636.

Policies underlying the Civil Rights Act, 42 U.S.C. §1983, also require that *res judicata* not be utilized to "... deny a full, federal hearing to persons who cannot be considered to have elected to litigate their section

1983 claims in state court". Comment, 88 Harv. L. Rev. 453, 460 (1974).[88] Federal res judicata permits consideration of the federal constitutional issues of this case by the three-judge court.

V.

THE THREE-JUDGE COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO APPELLEES.

The three-judge court properly granted partial summary judgment as no genuine issue of fact existed and appellees were entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56; *Graham v. Richardson*, 403 U.S. 365 (1971); *Roe v. Wade*, 410 U.S. 113 (1973). Because the three-judge court found the statutes unconstitutional on their face, the only material facts involved the application of the statutes against the debtors. *Associated Press v. United States*,

[88]Appellants' references to *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913) and *Central National Bank v. Stevens*, 169 U.S. 432 (1898) are of questionable relevance. In *Porto Rico, supra*, this Court decided that Puerto Rico cannot be sued without its consent. In *Central National Bank, supra*, this Court decided that a state court could not enjoin enforcement of a federal court decision.

326 U.S. 1 (1945). The creditors,[89] sheriff,[90] and judges[91] admitted that the civil contempt statutes were applied to all the debtors.

Indigency was not a material fact as the three-judge court held the statutes unconstitutional on their face. If it was, it was also a matter of public record as Vail,

[89]As defendant Goran never answered, all allegations are deemed admitted as to him. Fed. Rule Civ. Proc. 8(d); *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Fannin*, 257 F. Supp. 1017 (S.D. Ohio 1966); *Campbell v. Campbell*, 170 F.2d 809 (D.C.C. 1948); 2A Moore's Federal Practice §8.29, p. 1875 (1975). As defendant Montgomery failed to respond to paragraphs 17-61 of the complaint (A.162a-163a), dealing with the use of the procedures against Vail and Ward, those paragraphs are deemed admitted. Defendant Redl admitted that the statutory scheme was used against Nameth (A.157a ¶16).

While some creditors denied knowledge or information sufficient to form a belief as to whether the procedures were used against specific debtors, [A.150a B(1); A.150a C(1); A.163a (3); A.156a (1)], the use of the procedures was a matter of public record. Defendants "... may not assert lack of knowledge or information as to matters of public record...." *Porto Transport v. Consolidated Diesel Electric Corp.*, 20 F.R.D. 1, 2 (S.D.N.Y. 1956); 2A Moore's Federal Practice §8.22, p. 1822 (1975).

[90]Sheriff Quinlan admitted:

(1) that *ex parte* commitment orders were issued by the state judges (A.149a-VII A(2) ¶¶29, 30, 31);

(2) that his deputies arrested debtors pursuant to the warrants of commitment; (Vail – A.149a-VII A(2) ¶¶32, 33; McNair – A.150a-VII C(2); Humes – A.153a-XIII B(2) ¶¶4, 6, 7, & 10; Harvard – A.153a-XV (2) ¶¶11 & 12; Nameth – A.152a-XII B(2) ¶¶4, 6, 7, & 8);

(3) that the debtors were held pursuant to §774 until they paid their respective contempt fines; (Vail – A.149a-VII A(3) & (4); McNair – A.150a-VII E(3); Harvard – A.154a-XV (3).);

(4) and that the fines were delivered to the creditors pursuant to §773 (Vail – A.149a-VII A(4); McNair – A.150a-VII C(4); Harvard – A.154a-XV (4).

[91]The Judges never disputed the use of the statutes. (*See* A.B. at 6 & 7.)

Ward, Humes, and Harvard were recipients of various public assistance grants. As such, it was not proper for some defendants to deny knowledge or information with respect to that fact. *Porto Transport v. Consolidated Diesel Electric Corp.*, 20 F.R.D. 1, 2 (S.D.N.Y. 1956); 2A Moore's Federal Practice §8.22, p. 1822 (1975). In addition, defendant Goran never answered and thus admitted all allegations regarding indigency as to Vail and Ward. Defendant Montgomery admitted allegations with respect to indigency as to Vail and Ward.

The three-judge court had the power to grant summary judgment *sua sponte*. In *Briscoe v. Campagnie Nationale Air France*, 290 F. Supp. 863, (S.D.N.Y. 1968), the court noted:

> [n]o motion has been made by Air France for summary judgment but it is evident that such a judgment should be entered and the Court has authority to direct entry of such judgment even though there is no motion. 6 Moore's Federal Practice (2d ed.) 2241-46. (290 F. Supp. at 867)

See also Sibley Memorial Hospital v. Wilson, 488 F. 2d 1338, 1343-44 (D.C.C. 1973); *White v. Flemming*, 374 F. Supp. 267 (E.D. Wis. 1974), *aff'd*, 522 F. 2d 730 (7th Cir. 1975); *Federal Deposit Insurance Corp. v. Sumner Financial Corp.*, 376 F. Supp. 772 (M.D. Fla. 1974).

The granting of summary judgment was proper even though appellants had not answered. Defendants Redl, Quinlan, Montgomery, and Public Loan had answered. (A.156a, A.148a, A.162a, A.160a). At the time the action came before the three-judge court, appellants' motion to dismiss had been denied for three months, as it was denied in the opinion and order convening the three-judge court on January 13, 1975. (A.112a) Pursuant to Fed. Rule of Civ. Proc. 12(a), appellants had ten days to serve their answer after the denial of

the motion to dismiss. Fed. Rule of Civ. Proc. 56(a) also indicates that summary judgment may be granted before defendants answer. *See generally Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition*, Annot., 85 A.L.R. 2d 825 (1962).

VI.

CLASS ACTION RELIEF WAS PROPERLY GRANTED.

Class action relief was properly granted as appellees satisfied all requirements of Fed. Rule of Civ. Proc. 23. Appellants do not dispute that the following elements of Rule 23 have been met:

1) Joinder of all persons subject to the civil contempt procedures would be impracticable. *Korn v. Franchard Corp.*, 456 F. 2d 1206 (2d Cir. 1972);

2) Appellees' claims are typical of the claims of the class and appellees have no interests "... antagonistic to or in conflict with those they seek to represent". *Cannon v. Texas Gulf Sulphur Co.*, 47 F.R.D. 60, 63 (S.D.N.Y. 1969);

3) Appellees will fairly and adequately protect the interests of the class. *Serritella v. Engelman*, 339 F. Supp. 738, 748 (D.N.J.), *aff'd.*, 462 F. 2d 601 (3d Cir. 1972);

4) Rule 23(b)(2) class status is appropriate as appellants have enforced and utilized civil contempt procedures and thus acted on grounds generally applicable to the class. *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd.*, 406 U.S. 913 (1972).

Appellees also meet the requirements of Rule 23(a)(2) as the common question of law is the constitutionality of the civil contempt statutes. Because the three-judge court held the statutes unconstitutional

on their face, the questions of law are common. *Gesicki v. Oswald, supra* at 374. Furthermore, Rule 23(a)(2) requires that the questions of law be common and not identical. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) *aff'd.*, 390 U.S. 333 (1968). Contrary to appellants' assertion, the fact that some individuals retain counsel in civil contempt proceedings or are aware of the consequences of contempt does not eliminate the common legal questions. *See generally United States ex rel. Sero v. Preiser*, 506 F. 2d 1115, 1127 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975). The Advisory Committee Notes to Rule 23(b)(2) indicate that a (b)(2) class is appropriate where

> Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class. (Proposed Rules of Civ. Proc., Rule 23, Advisory Comm. Note, 39 F.R.D. 95, 102 (1966)).

Class relief was appropriately granted by the single district judge according to 28 U.S.C. §2284(5) (1965).

Contrary to appellants' assertions, the scope of the class was not responsible for local sheriffs' decisions to stop executing contempt fine orders in matrimonial non-support cases. The effect of the three-judge court order was to prevent the use of incarceration for nonpayment of support and alimony orders pursuant to §770 and N.Y. Domestic Relations Law §245 (McKinney 1975, amending McKinney 1964), as those statutes authorize the use of civil contempt statutes in Article 19 of the Judiciary Law as an enforcement mechanism for nonpayment of alimony and support orders. The three-judge court order had no effect on the use of incarceration in the Family Court Act procedures for nonpayment of support orders. N.Y. Family Court Act §156 (McKinney 1975). (*See* p. 44 *supra*).

VII.

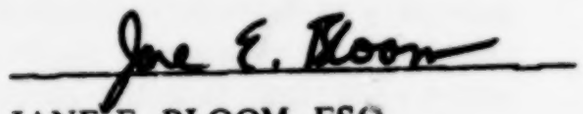
THE THREE-JUDGE COURT ORDER WAS PRESENT AND PROSPECTIVE.

The three-judge court order which declared invalid and enjoined the operation of the statutes as to ". . . all persons who have been or are presently subject to civil contempt proceedings . . ." (A.174a) was not retroactive. The fact that the court used the terms "have been" rather than "had been" confirms the present and prospective nature of the relief. The order also must be read in light of the language in the court's opinion. *See Goss v. Lopez*, 95 S. Ct. 729, 734 fn. 6 (1975). The opinion clearly states that: ". . . we declare unconstitutional and enjoin *further* application of Sections 756, 757, 770, 772, 773, 774 and 775 of Article 19 of the New York Judiciary Law". (emphasis added) (J.S.9a) The relief is appropriately present and prospective.

CONCLUSION

For the reasons stated, the three-judge court order should be affirmed.

Respectfully submitted,



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MORRIS DEES, *Of Counsel*

DATED: Poughkeepsie, New York
September 28, 1976

APPENDIX

EXHIBIT #1 – SUBPOENA

COUNTY COURT
COUNTY OF DUTCHESS

Index No.

PUBLIC LOAN COMPANY, INC.

Plaintiff

against

HARRY VAIL, JR. AND CHARLENE VAIL

Defendant

SUBPOENA (Duces Tecum)
To Take Deposition of Judgment
Debtor

THE PEOPLE OF THE STATE
OF NEW YORK

TO
The Judgment Debtor HARRY VAIL, JR.
Address: CORNER OF MAIN AND WHITE STREETS POUGHKEEPSIE, NEW YORK.

GREETING:

WHEREAS, *in an action in the* CITY *court of* THE CITY OF POUGHKEEPSIE *county of* DUTCHESS *between* PUBLIC LOAN COMPANY, INC. *as plaintiff and* HARRY VAIL, JR. AND CHARLENE VAIL *as defendant who are all the parties named in said action, a judgment was entered on* JANUARY 18th, 1974 *in*

favor of PUBLIC LOAN COMPANY, INC. *judgment creditor and against* HARRY VAIL, JR. AND CHARLENE VAIL *judgment debtor in the amount of* $534.63 *of which* $534.63 *together with interest thereon from* JAN. 18th, 1974 *remains due and unpaid; and*

WHEREAS, *the above named judgment debtor resides; is regularly employed; has an office for the regular transaction of business in person; in* DUTCHESS *county;*

NOW, THEREFORE, WE COMMAND YOU *to appear and attend before* CHARLES P. MORROW *at* 40 Cannon Street Poughkeepsie, New York *on the* 28th *day of* May 1974 *at* 10:30 *o'clock in the* fore *noon and at any recessed or adjourned date for the taking of a deposition under oath upon oral or written questions on all matters relevant to the satisfaction of such judgment;*

AND WE FURTHER COMMAND YOU *to produce for examination at such time and place the following books, papers and records:*

ALL TAX RETURNS FROM THE YEARS 1972, 1973
ALL SAVINGS ACCOUNTS NOW ACTIVE
ALL CHECKING ACCOUNTS NOW ACTIVE
ANY LOAN BOOKS YOU MAY HAVE

and all other books, papers and records in your possession or control which have or may contain information concerning your property, income or other means relevant to the satisfaction of the judgment;

TAKE NOTICE *that false swearing or failure to comply with this subpoena is punishable as a contempt of court.*

WITNESS, *Honorable* ULDRICH *one of the justices of our said Court, at the Court House in the County of* DUTCHESS *the* 19th *day of* April 1974.

/s/Charles P. Morrow
Charles P. Morrow

GILDAY & MORROW, ESQS

Attorney(s) for Judgment Creditor
Office and Post Office Address

40 Cannon Street
Poughkeepsie, New York

EXHIBIT #2 – ORDER TO SHOW CAUSE

At a Special Term Part of the COUNTY *Court of the* STATE OF NEW YORK *held in and for the County of* DUTCHESS *at the Court House thereof on the* 22nd *day of* July, 1974

Index No.

PRESENT
Hon. JIUDICE

PUBLIC LOAN COMPANY, INC.

Plaintiff

against

HARRY VAIL, JR. AND CHARLENE VAIL

Defendant

ORDER TO SHOW CAUSE TO PUNISH–JUDGMENT DEBTOR–WITNESS– FOR CONTEMPT

*On the subpoena, the affidavit of due service of said subpoena upon the judgment debtor (witness), * * * all of which are hereto annexed, and upon the affirmation of* CHARLES P. MORROW, ESQ. *dated* JULY 19th, 1974 *by which it appears that the person subpoenaed failed to comply with said subpoena–stipulation–and upon the notation of default appearing thereon.*

IT IS HEREBY ORDERED, *that* HARRY VAIL, JR. *appear before me or one of the justices of the* COUNTY *Court of the* DUTCHESS *County of* STATE OF NEW YORK *at a* SPECIAL *Term, Part to be held*

at the Court House at MARKET STREET, POUGHKEEPSIE, NEW YORK *on the* 13th *day of* AUGUST 1974 *at* 9:30 *o'clock in the* fore *noon of that day and show cause why* he *should not be punished as for contempt for violation of and non-compliance with the said subpoena * * * in that* he *failed to appear or respond pursuant thereto, and why* he *should not pay the costs of this motion, and why the judgment creditor herein should not have such other and further relief as may be proper.*

Service personnally *of a copy of this order and of the papers upon which it is based, on the said* HARRY VAIL, JR. *on or before the* 3rd *day of* AUGUST 1974 *shall be deemed sufficient.*

Enter

/s/ [illegible]
Justice of the COUNTY COURT

EXHIBIT #3 – ORDER IMPOSING FINE

At a Special Term Part of the COUNTY *Court of the* STATE OF NEW YORK *held in and for the County of* DUTCHESS *at the Court House thereof on the* 30th *day of* August 1974

Index No. 15643

PRESENT
Hon. JIUDICE *Justice*

PUBLIC LOAN COMPANY

Plaintiff

against

HARRY VAIL, JR.

Defendant

ORDER IMPOSING FINE

On reading the subpoena * * * *dated* 19th of April 1974 *which directed* HARRY VAIL, JR. *to* APPEAR AND ANSWER QUESTIONS IN SUBPEONA *the affidavit* VIRGINIA TRAVER *verified the* 23 *day of* April 1974 *showing due service thereof.*

the order to show cause why HARRY VAIL, JR. *should not be punished for contempt of court, dated the* 22nd *day of* July 1974, *the affirmation of* CHARLES P. MORROW, ESQ. *dated the* 19th *day of* July 1974 *in support of said order; the affidavit of* VIRGINIA TRAVER *dated the* 24th *day of* July 1974 * * * *

NOW ON MOTION *of the attorney(s) for the judgment creditor, it is*

ORDERED *that this motion to punish for contempt is granted and* HARRY VAIL, JR. *is adjudged guilty of contempt of court in having wilfully disobeyed said subpoena* * * * *in that he failed to* comply therewith *and failed to satisfactorily excuse or explain said contempt; and it is*

ADJUDGED *that said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor; and it is*

ORDERED *that* HARRY VAIL, JR. *be and hereby is fined for said contempt the sum of* $250 *together with* $20 *costs of these proceedings making a total of* $270 *to be paid to the judgment creditor at the offices of the attorney(s) for the judgment creditor at* 40 Cannon Street Poughkeepsie, New York *in installments of* $10 *commencing on* week received this order *and continuing on each* week *thereafter until said total fine is paid and when paid,* $270 *thereof shall be applied toward the satisfaction of the judgment herein, and it is*

ORDERED *that a copy of this order be served upon* HARRY VAIL, JR. *personally, and it is*

ORDERED *that upon failure to pay said fine as aforesaid, the entire amount imposed shall immediately fall due and a committment order issue without further notice to the said person directed to the* * * * *Sheriff of any county within the State of New York wherein said person may be apprehended, commanding him forthwith to arrest said person without further process, and commit him to the county jail of said county and hold him in close custody until he shall pay said fine or is discharged according to law.*

Enter

/s/ [Illegible]
Justice of the COUNTY COURT

EXHIBIT #4 – COMMITMENT ORDER

At a Special Term, Part COUNTY COURT *of the* STATE OF NEW YORK *County of* DUTCHESS, *held at the Courthouse, No.* CITY OF POUGHKEEPSIE, NEW YORK *on the* 23 *day of* Sept., 1974.

Index No. 15643

Present
Hon. JOSEPH JIUDICE
Justice

PUBLIC LOAN

Plaintiff(s)

against

HARRY VAIL, JR.

Defendant(s)

COMMITMENT ORDER

*On reading the subpoena *,*,* dated* APRIL 19th, 1974 *which directed* HARRY VAIL, JR. *to* appear and answer for examination and supplementary proceedings, *the affidavit of* Virginia Traver *verified* April 23rd 1974 *showing due service thereof. the order to show cause why* HARRY VAIL, JR. *should not be punished for contempt of court, dated* JULY 22nd, 1974, *the affirmation of* CHARLES P. MORROW, ESQ. *dated* JULY 19th 1974 *in support of said order; the affidavit of* VIRGINIA TRAVER *dated* July 24th, 1974 *showing due service of a certified copy of said order to show cause, * * * **

AND *on reading and filing the order entered herein on* August 30th 1974 *fining the said the sum of* $270 *and directing the payment of said fine in instalments of* $10 *each commencing on* September 9th 1974 *and on reading and filing the affidavit of* George Traver *verified* September 4th 1974 *showing the service of a certified copy of said order with notice of entry thereof on said* Harry Vail, Jr. *and the* AFFIDAVIT OF NON-COMPLIANCE *dated* SEPTEMBER 16th 1974 *showing that said order has not been complied with.*

NOW ON MOTION OF GILDAY & MORROW, ESQS. *attorney(s) for* PUBLIC LOAN *judgment creditor, it is*

ORDERED, *that the motion to punish said* HARRY VAIL, JR. *for contempt is granted; and it is*

ADJUDGED, *that he is guilty of contempt of Court in having willfully disobeyed said order * * * dated* AUGUST 30th 1974 *in that he* failed to comply *pursuant thereto, and that he has failed to satisfactorily excuse or explain said contempt; it is*

ADJUDGED, *that his misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor herein; it is*

ADJUDGED, *that he has failed to purge himself of said contempt and has failed to pay the fine imposed by said order entered on* AUGUST 30th 1974 *herein imposed on him for his said contempt, to wit, the total sum of* $270; *it is therefore*

ORDERED, *that without further notice to said* HARRY VAIL, JR. *the Sheriff of any County within the State of New York–wherein he may be apprehended shall forthwith arrest him without further process, and commit him to the County Jail of said County and hold him in close custody until he shall have paid said fine of* $270 *together with said Sheriff's*

fees and the disbursements on the execution of this order, or is discharged according to law.

ENTER

/s/ Joseph Jiudice
Justice of the COUNTY COURT

EXHIBIT #5 – ASSEMBLY BILL NO. 10319/SENATE PRINT NO. 12063 AND MEMORANDUM

STATE OF NEW YORK

Cal. No. 970 **21063**

IN SENATE

February 26, 1976

Assembly Bill No. 10319 introduced by Messrs. THORP, COOPERMAN–Multi-Sponsored by–Mr. DiFALCO–read twice and referred to the Committee on Judiciary–substituted for Senate Bill No. 8104 by Sen. Gordon–reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT

to amend the judiciary law, the family court act and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections seven hundred fifty-six, seven hundred fifty-seven, seven hundred fifty-nine, seven hundred sixty-two, seven hundred sixty-three, seven hundred sixty-four, seven hundred sixty-five, seven

---

EXPLANATION–Matter in *italics* is new; matter in brackets [] is old law to be omitted.

hundred sixty-six, seven hundred sixty-eight and seven hundred sixty-nine of the judiciary law are hereby repealed.

§2. Such law is hereby amended by adding thereto two new sections, to be sections seven hundred fifty-six and seven hundred fifty-seven, to read, respectively, as follows:

§756. Application to punish for contempt; procedure. An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense; or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred fifty to the civil practice law and rules or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT

§757. Application to punish for contempt committed before referee. Where the offense is committed

upon the trial of an issue referred to a referee appointed by the court, or consists of a witness's non-attendance, or refusal to be sworn or testify, before him, the application prescribed in this section may be made returnable before him or before the court. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law.

§3. Section seven hundred sixty of such law is hereby amended to read as follows:

§760. When [order to show cause] *application* may be made. An [order to show cause] *application* may be made, either before or after the final judgment in the action, or the final order in the special proceeding.

§4. Section seven hundred sixty-one of such law, as amended by chapter nine hundred of the laws of nineteen hundred forty-seven, is hereby amended to read as follows:

§761. [Order to show cause defined; service] *Notice to accused; service.* [An order to show cause is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein. In] *An application to punish for contempt in* a civil contempt proceeding [such order to show cause] shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge.

§5. Section seven hundred sixty-seven of such law is hereby amended to read as follows:

§767. When habeas corpus may issue. If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge[, a warrant of attachment can not be issued. In that case,] the court, upon proof of the facts, [must] *may* issue a writ of

habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must[, except in a case where the production of the accused under a warrant of attachment would be dispensed with,] bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

§6. Section seven hundred seventy of such law, as amended by chapter three hundred ten of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§770. Final order directing punishment; exception. *Upon the return of an application to punish for contempt, or upon a hearing held upon a warrant of commitment issued pursuant to section seven hundred seventy-two or seven hundred seventy-three, the court shall inform the offender that he has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him.* If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except *as hereinafter provided.* [where] *Where* an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge

before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may, in its or his discretion, deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

Where an application is made to punish an offender for an offense committed with respect to an enforcement procedure under the civil practice law and rules, if the offender appear and comply and satisfy the court or a judge before whom the application shall be pending that he has at the time no means or property or income which could be levied upon pursuant to an execution issued in such an enforcement procedure, the court or judge shall deny the application to punish the offender without prejudice to the applicant's rights and without prejudice to a renewal of the application upon notice and after proof that the financial condition of the offender has changed.

§7. Section seven hundred seventy-two of such law, as amended by chapter two hundred ninety of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

§772. Punishment upon return of [order to show cause] *application.* Upon the return of an [order to show cause] *application to punish for contempt*, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. [Upon a certified copy of the order so made, the offender may be committed, withour further process.]

Except as hereinafter provided, the offender may be committed upon a certified copy of the order so made, without further process. Where the commitment is

ordered to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and the defendant has not appeared upon the return of the application, the final order directing punishment and commitment of the offender shall include a provision granting him leave to purge himself of the contempt within ten days after personal service of the order by performance of the act or duty the omission of which constitutes the misconduct for which he is to be punished, and the act or duty to be performed shall be specified in the order. Upon a certified copy of the order, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the act or duty specified has not been performed, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such further disposition as the court in its discretion shall direct.

§8. Section seven hundred seventy-three of such law is hereby amended to read as follows:

§773. Amount of fine. If an actual loss or injury has been [produced] *caused* to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

Where it is not shown that such an actual loss or injury has been [produced] *caused*, a fine [must] *may* be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

If a fine is imposed to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and it has not been shown that such an actual loss or injury has been caused and the defendant has not appeared upon the return of the application, the order imposing fine, if any, shall include a provision granting the offender leave to purge himself of the contempt within ten days after personal service of the order by appearing and satisfying the court that he is unable to pay the fine or, in the discretion of the court, by giving an undertaking in a sum to be fixed by the court conditioned upon payment of the fine plus costs and expenses and his appearance and performance of the act or duty, the omission of which constitutes the misconduct for which he is to be punished. The order may also include a provision committing the offender to prison until the fine plus costs and expenses are paid, or until he is discharged according to law. Upon a certified copy of the order imposing fine, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the fine plus costs and expenses has not been paid, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such other disposition as the court in its discretion shall direct.

§9. Section seven hundred seventy-five of such law, as amended by chapter three hundred ten of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§775. When court may release offender. Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or preformed, in order to entitle him to be released, the court, judge, or referee[, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued,] may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

Where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, and the offender has purged himself of contempt as provided in section seven hundred seventy-two or seven hundred seventy-three of this article, the court out of which the execution was issued shall make an order directing him to be discharged from the imprisonment.

§10. Section seven hundred seventy-seven of such law is hereby amended to read as follows:

§777. Proceedings when accused does not appear. Where a person[, arrested by virtue of a warrant of attachment,] has given an undertaking for his appearance, as prescribed in this article and fails to appear, on the return day of the [warrant] *application* the court may either issue [another] *a* warrant *of commitment* or make an order, directing the undertaking to be prosecuted; or both.

§11. Section two hundred forty-five of the domestic relations law, as amended by chapter four hundred ninety-seven of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§245. Enforcement by contempt proceedings of judgment or order in action for divorce, separation or annulment. Where the husband, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment or declaration of nullity of a void marriage rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced [by resorting to the security, if any, given as prescribed by statute, the court, in its discretion, may make an order requiring the husband to show cause before it at a time and place therein specified why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court other than a criminal contempt] *pursuant to section two hundred forty-three or two hundred forty-four of this chapter or section forty-nine-b of the personal property law, the wife may make application pursuant to the provisions of section seven hundred fifty-six of the judiciary law to punish the husband for contempt*, and where the judgment or order directs the payment to be made in installments, or at stated intervals, failure to make such single payment or installment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish him as for a contempt for his failure to pay subsequent installments, but for such purpose he may be proceeded against under the said order in the same manner and with the same effect as though such installment payment was directed to be paid by a separate and distinct order, and the provisions of the civil rights law are hereby superseded so far as they are in conflict

therewith. Such [order to show cause] *application* may also be made without any previous sequestration or direction to give security where the court is satisfied that they would be ineffectual. No demand of any kind upon the husband shall be necessary in order that he be proceeded against and punished for failure to make any such payment or to pay any such installment; personal service upon the husband of an uncertified copy of the judgment or order under which the default has occurred shall be sufficient.

§12. Section four hundred fifty-four of the family court act, as amended by chapter ten hundred ninety-seven of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

§454. Powers on failure to obey order. *1.* If a respondent is brought before the court for failure to obey any lawful order issued under this article and if, after hearing, the court is satisfied by competent proof that the respondent has failed to obey any such order, the court may

(a) commit the respondent to jail for a term not to exceed six months, if the failure was willful. Such commitment may be served upon certain specified days or parts of days as the court may direct, and the court may, at any time within the term of such sentence, revoke such suspension and commit the respondent for the remainder of the original sentence, or suspend the remainder of such sentence. Such commitment does not prevent the court from subsequently committing the respondent for failure thereafter to comply with any such order; or

(b) place the respondent on probation under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law; or

(c) proceed under part seven of this article concerning undertakings; or

(d) issue an order of sequestration under section four hundred fifty-seven.

2. The court in its discretion may use any or all of the powers conferred by this section.

3. The respondent shall not be committed to jail pursuant to this section unless the court makes an order requiring such respondent to show cause at a time and place specified therein why he shall not be punished for contempt for his failure to obey any such lawful order. Such order to show cause shall be personally served upon the respondent and shall contain a clear statement of the purpose of the hearing and a warning that failure to appear may result in contempt of court and imprisonment in accord with the notice provision of section seven hundred fifty-six of the judiciary law.

§13. This act shall take effect immediately.

EXHIBIT #5 – MEMORANDUM

INTRODUCED BY: MR. THORP

TITLE: AN ACT to amend the judiciary law and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto

PURPOSE: The purpose of the bill is to conform to due process standards the procedure set forth in Article 19 of the Judiciary Law for the punishment of civil contempts of court.

SUMMARY OF PROVISIONS: The bill repeals the existing procedure for the punishment of contempt of court, which is initiated by order to show cause or warrant of commitment, which may be issued without notice. Under the revised procedure, an application to punish an offender for contempt will be brought on by order to show cause or notice of motion, and a hearing will be held at least ten but no more than thirty days after service of notice on the offender. If the offender fails to appear at the hearing, and the case involves supplementary proceedings to enforce a money judgment or failure to make payments for alimony or child support, the offender will be arrested and brought before the court prior to commitment for a hearing on his ability to pay.

JUSTIFICATION: In *Vail v. Quinlan*, decided January 7, 1976 by the U.S. District Court for the Southern District of New York, a three-judge court unanimously declared unconstitutional the provisions of the New York Judiciary Law relating to punishment for civil contempts of court. The case involved a judgment debtor who had been incarcerated in the Dutchess County Jail for failure to pay a fine imposed for failure to comply with a subpoena issued pursuant to Article 52 of the CPLR. The judgment of the court, however, enjoined the enforcement of the relevant sections of the Judiciary Law without limiting the injunction to cases arising in enforcement proceedings.

Almost immediately, law enforcement officers announced that the decision in *Vail v. Quinlan* prohibited the execution of any order or warrant for civil arrest, with the minor exception of arrests ordered pursuant to CPLR Article 61. (N.Y. Law Journal, 1/12/76). Subsequently, the District Court denied an application for a stay and declared that its judgment extended to all persons committed or sought to be committed for civil contempt. (N.Y. Law Journal 1/12/76). On January 27, 1976, Supreme Court, Kings County, declared unconstitutional related provisions of the Domestic Relations Law which provide for the enforcement of

alimony and support orders by civil contempt proceedings. *Darbonne v. Darbonne* (N.Y. Times, 1/30/76).

As a result of these decisions, there exists no enforceable procedure for the civil punishment of contempts in New York State. Because the efficacy of all civil procedure depends ultimately on the power of the court to compel obedience to its orders, judgments and process, the situation threatens to deprive countless litigants of their legal remedies. Especially vulnerable are the wives and children of husbands who fail to make court-ordered alimony and support payments; many of these dependents may be forced to seek public assistance.

The provisions of the bill are designed to meet the objections raised by *Vail* and *Darbonne*, while modernizing a procedure that has existed in its present form since 1909. The bill repeals §756, which provides for the issuance of a warrant of attachment without notice where the offender has refused or neglected to obey a court order requiring the payment of a fine or other sum of money. Also repealed are nine other sections of Article 19 which relate to procedure upon warrant of attachment.

The revised procedure for punishment of contempt is set forth in a new §756, which provides for personal

service upon the offender of moving papers containing a notice warning that contempt is punishable by fine or imprisonment. The offender will not be punished if he appears and shows that he is unable to pay support or satisfy the judgment; if he fails to appear, the court may make an order of commitment granting the offender leave to purge himself of the contempt within ten days. Thereafter, the sheriff must arrest the offender and bring him before the court prior to committing him to prison. Because a hearing will precede all committments in cases arising under §245 of the DRL and Article 52 of the CPLR, no change in the procedure for periodic review set forth in §774 is necessary.

These provisions eliminate *ex parte* proceedings to punish for civil contempt, and ensure adequate notice and hearing before an offender will be committed to prison. The bill also includes a related amendment to DRL §245, which would require a wife to exhaust alternative procedures for the enforcement of support orders before resorting to contempt proceedings.

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1397

JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, JR., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS AND SUPPLEMENTAL APPENDIX

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REPLY BRIEF FOR APPELLANTS

Statement

This reply brief is submitted in response to the Brief for Appellees and Brief of Amicus Curiae, New York State Consumer Protection Board.

1. The questions of abstention and *res judicata* are threshold issues to be determined before the constitutional issues allegedly raised by the complaint may be reached.

The court below in its opinion (J.S. 4a-7a) and the Brief for Appellants (pp. 11-16) discussed abstention before

reaching the constitutional issues. We also discussed *res judicata* (Br. for App'ts., pp. 16-17) in that context.* However, the appellees have discussed the constitutional questions as if they were the basic issues, thereby relegating abstention to a subsidiary position.

The appellants fail to offer any persuasive basis for distinguishing this case from *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). As we pointed out in our main brief the district court labelled the state court procedure as quasi-criminal and accordingly it does not require any new pronouncement for this Court to conclude that the *Huffman* rule was controlling here. The same criticisms of that approach rejected in *Huffman* are repeated by appellants here and are without force. If perchance the *Huffman* rule is regarded as requiring extension here because the state court proceedings are quasi-criminal, rather than criminal, then we submit the same considerations of comity are applicable here. The unseemly character of making the named Judges of the State's County Court parties to this litigation in the Federal courts simply because one or the other signed an order regularly presented upon the unquestioned default of the judgment debtor because of far-out claims of alleged constitutional import never presented to either one of the Judges or to any other State Judge must be readily apparent. There is no reason that the Federal courts should provide a vehicle for such far-out claims when the State court proceedings

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* Appellees' contention (Br., p. 60[IV, A]) that appellants failed to raise *res judicata* in the Jurisdictional Statement is erroneous. In our Jurisdictional Statement (p. 18) we stated that the judgment herein was "in defiance of *res judicata* . . ." In accordance with Supreme Court Rule 15(1)(c), the question or issue was "set forth in the jurisdictional statement or fairly comprised therein. . . ." Furthermore, *res judicata* was listed as a ground for dismissal of the complaint by appellants in their Notice of Motion to Dismiss (164a).

pending before such Federal action offer an opportunity, if desired, to test out such theories, which, as the *amicus* indicates, is an effort to abort the State's system of proceedings supplementary to the State court's judgment in its enforcement.

Appellees fail, too, to deal with the significance of the fact, pointed out in our main brief that in the New York City courts, at least—the equivalent of the County Court—the order to show cause contains the additional cautionary language which the district court felt erroneously was a constitutional requirement (Main br. p. 25, fn.) So that the three-judge court was dealing with an alleged criticism having local application insofar as supplementary proceedings were concerned and with a state statute which by its terms did not rule out such additional language.

A. Adequacy of State Remedy.

Appellees' conclusion (Brief, p. 48) that state court remedies are inadequate is erroneous. A reading of *Matter of Smiley*, 36 N Y 2d 433, 330 N.E. 2d 53, 369 N.Y.S. 2d 87 (1975), fails to support the proposition that appellees will be deprived of counsel in civil contempt proceedings if such assistance is necessary or warranted. *Smiley* concerns an action for divorce. As there stated (36 N Y 2d, at 441), "[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case (CPLR 1102, subd. [a]. . . ." Also alluded to are the voluntary organizations and federally-funded programs providing legal assistance.

It should also be pointed out that there is no showing that CPLR 5015 (App'ts Br., p. 22)—a motion to vacate the default and subsequent order—is not a "plain, adequate and complete remedy at law." See *Gras* v. *Stevens*, 415 F. Supp. 1148, 1154 (S.D.N.Y., 1976) and citation (at 1153) of *Matthews* v. *Rodgers*, 284 U.S. 521, 526 (1932). Under *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975),

if appellees' attacks on the constitutionality of the statutes fail in the New York courts, an appeal to this Court would lie as a matter of right, 28 U.S.C. § 1257(2). A possible shifting of the burden of proof is irrelevant.* A litigant attacking the constitutionality of the statutes in question always bears the burden of proof of persuasion regardless of the time of making the motion or claim. *Van Berkel* v. *Power*, 16 N Y 2d 37, 40, 209 N.E. 2d 539, 261 N.Y.S. 2d 876 (1965). Obviously the appellants or judgment creditors never had any burden of proving the Judiciary Law to be constitutional.

Gras v. *Stevens, supra* (415 F. Supp. at 1154), indicates that a state court litigant cannot simply enter federal court to challenge state law or court procedures. *Gras* involved a divorce proceeding which obviously had no "criminal" overtones.**

B. Deference to State Courts, Not Private Litigants, is Involved.

Appellees (Br., p. 49) rely on *Joiner* v. *City of Dallas*, 380 F. Supp. 754 (N.D. Tex., 1974), affd. 420 U.S. 1042 (1974), as their lead case that federal comity does not require deference "to procedurally unconstitutional state civil contempt, statutes." Of course appellees beg the question—they assume the statutes are unconstitutional. However, *Joiner* was a challenge to the power of eminent domain in Texas. The court did decline to abstain but this was before this Court's decision in *Huffman*, cf. *Ahrensfeld* v. *Stephens*, 528 F. 2d 193 (7 Cir., 1975). The holding, however, upheld the constitutionality of the statutes. The latter was what this Court affirmed, 420

* Cf. Appellees' Br. p. 42.

** *Doe* v. *Maher*, 422 U.S. 391 (1975), on remand, 414 F. Supp. 1368 (D. Conn. 1976), declined to abstain (cf. App's Br. p. 52, n. 74). The overriding issue was the federal Social Security Act, *supra* at 1382, not civil contempt procedures.

U.S.C. 1042.* (Citation by the appelles of the affirmance, without explanation, has a misleading effect.)

The power of a court to punish violations of court orders is so basic, that any injunction against that power must have a devastating affect on state court processes. The process here is controlled by the state court. Contrary to appellees, Br., p. 52, n. 52, 77, the civil contempt proceeding is *not* commenced by service of a summons.**

Plainly, as *Huffman* recognizes, invocation of absention herein is not an unwarranted limitation on the federal court's power. *Mitchum* v. *Foster*, 407 U.S. 225, 243-244 (BURGER, C.J. conc.) (1972), recognized that a Federal court must always consider principles of federalism, equity and comity. *Huffman* v. *Pursue, Ltd., supra*, surely extended this recognition to such civil matters as involved here. In essence, the Federal court here exercised appellate jurisdiction over the state court. This is not one of its powers. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).

To contend that the Judiciary Law is "flagrantly and patently violative of express constitutional prohibition"

* The *Joiner* opinion, *supra*, 380 F. Supp. at 778-779, recites the whole statutory scheme. While it is upheld, the court notes the basic problems that may flow from "outmoded statutes." The statute may "fall far short of perfection." It noted due process (and equal protection) are not static concepts, but neither "are they protean labels capable of encompassing every desirable innovation and improvement" (779). The Constitution does not purport to correct every wrong. *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972).

Much the same could be said of the New York Judiciary Law and civil contempt. Yet the Constitution is the bedrock of our legal system, not the summit.

** The appellees even contradict this statement themselves. Br., p. 23, n. 27(4) citing *Byrne* v. *Long Island State Park Commission*, 67 Misc 2d 1084, 1085, 325 N.Y.S. 2d 147 (S. Ct., Nassau Co., 1971). Judiciary Law § 757 requires an order to show cause or a warrant of attachment, or perhaps both if appropriate. See Main Br., p. 23.

(Appellees' Brief, p. 54) is absurd. Basic due process is notice and an opportunity to be heard. The statute here provides this (J.S. 7a). The inordinately lengthy briefs of appellees and *amicus* amply demonstrate their difficulty in attempting to make such a point.

Appellees also purport to show that orders in contempt matters are not judgments and not subject to principles of *res judicata* (Appellees' Brief, pp. 60-61). This particular argument is berift of any support. The cases cited do not stand for the proposition advanced. Judgments in New York are defined by CPLR 5011. Whether an action or "special proceeding", the final paper in either is a "judgment." See Practice Commentary (D.D. Siegel) to § 5011, 7B McKinney's CPLR 3401 to 5100; p. 548. Federal law, 28 U.S.C. § 1738, gives full faith and credit to "records *and* judicial procedings" of any state court. Obviously the technical label of an order in a civil contempt proceeding should not affect its sufficiency.

2. The grant of summary judgment was error.

The appellees (V, Br., p. 62 *et seq.*) continues to ignore the fact they were not moving for summary judgment, partial or complete and that the district court itself took the action under Rule 8. Appellants were not disputing any of the allegations in the affidavits as they were moving to dismiss. Appellees picture the fact of "indingency" as without significance. Yet the district court found Vail, the "typical" plaintiff, indigent (J.S. 2a-3a). No defendant, certainly appellants, knew of Vail's indigency in the state court. To remedy this, appellees claim indigency "was also a matter of public record as Vail, Ward, Humes, and Howard were recipients of various public assistance grants" (pp. 63-64) and it was not proper to deny such knowledge. Such a statement, and it is concurred in at two places by the *Amicus* (Br., pp. 53 and 69, n. 15), is directly contrary to New York law. Receipt of public assistance is not a matter of "public record" in New

York. By virtue of Social Services Law § 136 names and address of persons receiving or even applying for such assistance are confidential and available only in limited circumstances. Defendants or appellants could not know appellees were on public assistance unless appellees so informed them.

We have already noted in our "Statement of the Case", Main Br., pp. 5-6, that if appellees had pointed out to the state court their indigency they would be released from civil imprisonment, or end the examination in supplementary proceedings. This has ample support in New York law. In *Matter of Oysterman's Bank and Trust Co.* v. *Colby*, 62 Misc 2d 64, 308 N.Y.S. 2d 284 (Sup. Ct., Suffolk Co., 1968), the court denied a motion to punish for contempt for failure to be examined. This was simply on the basis of a letter from the judgment debtor's daughter and the County Department of Social Services indicating that the debtor was on public assistance. Note this result did not depend on counsel's assistance. Further the court enjoined any further proceeding to enforce the judgment. This was pursuant to Social Services Laws §§ 137. 137-a.

There is of course no bar to the appearance of counsel at the return of the order to show cause or at any other time, but the only purpose of counsel is either to challenge the service of the subpoena or to offer an excuse acceptable to the court for the non-appearance of the judgment debtor [or the failure to make the support payment]. Since the court below speedily converted the motion to dismiss into summary judgment, it did not have before it statistical proof that in almost every case where a judgment debtor appeared on the return of the order to show cause, offered an excuse for failure to respond to the subpoena and readiness to submit to the discovery, the court did not impose any fine. It is fanciful to preach the necessity of counsel to be supplied to indigent judgment debtors, since by appearance and submitting to discovery at the return of the order to show cause, not only would there be no fine but

there would be finding of no assets available for the judgment. See *Oysterman's Bank, supra.*

This points up the unsupportable character of the district court's granting of summary judgment. Indeed its action shows that it ignored the established principle that "summary judgment is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy". *Robert Johnson Grain Co.* v. *Chem. Interchange Co.*, 541 F. 2d 207, 209 (8th Cir. 1976). The court also failed to "view the facts in the light most favorable to the party opposing the motion and to give that party [the appellants here] the benefit of reasonable inferences to be drawn from [the] underlying facts." *Ibid.* at 210, citing *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 153-59; *United States* v. *Diebold, Inc.*, 369 U.S. 654; *Perciuzi* v. *General Motors Corp.*, 539 F. 2d 1126 (8th Cir. 1976).

3. The statutes involved did not deny appellees' due process.

At several places in appellees' brief there is emphasis on assumed lack of finding of wilfulness. This is mistaken as is evident from the orders of the County Court. Thus ". . . Harry Vail, Jr., is adjudged guilty of contempt of court in having wilfully disobeyed said subpoena . . ." in that he failed to comply therewith and failed to satisfactorily excuse or explain said contempt (Appellees' App. 7a). See same language in commitment order (A. App. 9a). Every such order must contain such finding.

Furthermore, contrary to the view of appellee, such order also contain the finding that "said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor."

Continued reiteration of the rubric of the right to a hearing to explain Vail's (or any other appellee's) absence on the subpoena return date has no vitality here. The commitment order follows the opportunity extended to explain the failure to respond to the subpoena by the procedure for the service of the order to show cause as to why such person should not be adjudged in contempt. Thus every such person is afforded a full opportunity to explain failure to respond to the subpoena and it is simply an effort to remake the judgment creditor discovery proceedings or the matrimonial support proceedings to insist that the order to show cause is constitutionally inadequate because it fails to spell out the possible disposition of the contempt proceedings. There is absolutely no support for any statement that the failure to respond to the contempt order to show cause was because such disposition is not spelled out in the order to show cause. It is not the function of the Federal courts to substitute their judgment as to what may be constitutional by their judgment as to what may be desirable. *Lindsay* v. *Nornet, supra*, 405 U.S. 56.

Due process is fully satisfied by the opportunity extended to the contemnor to explain the failure to respond to the subpoena or in matrimonial matters to comply with the support order before any commitment order is made and if the contemnors ignore such order to show cause there is no constitutional requirement of due process which would insist that another opportunity must be tendered for the same purpose. The principles enunciated in the cases cited by appellee are fully complied with in the statutory procedure.

It is to be noted in this connection that the order finding the judgment debtors in contempt provides for installment payments of the fine over a period of five months and that such persons, if they shall have any explanation, have an additional opportunity to appear in court and seek recall of the order entered upon their default. (See App. App. 7a). Vail simply ignored the "order imposing

fine" made on August 30, 1974. The commitment order (App. 8a-9a) was made about a month later on September 23rd, demonstrating the more than adequate opportunity to seek recall of the contempt order and to offer any explanation, a variety of which are conjured up by appellees.

In this connection the extended references to defective service ("sewer service") either in the brief of appellees or in the amicus brief has no relevance to the legal issues presented to this Court. In the record here no appellee has challenged the validity of the service of the discovery subpoena, the order to show cause, or of the order imposing the fine.

Insofar as such briefs evidence any attitude antagonistic to the proceedings supplementary by judgment, it overlooks the fact that the State has an interest in facilitating the enforcement of judgments obtained in its courts.

4. Class Action treatment.

The appellees in supporting class action status allege commonality of the issues. As the seven sections of the Judiciary Law were enjoined the issues must be common to all who are subjected to civil contempt. Truly this is not the case here. The appellant in *Agur* v. *Wilson*, 498 F. 2d 961 (2d Cir., 1974), *cert. den.* 419 U.S. 1072 (1974) is as much a member of the class as Mr. Vail. Despite the decision in *Agur*, the statute are enjoined as to all persons allegedly in contempt. The injunctive relief flows to the class without limitation.

5. The availability of relief at any stage does not require an actual hearing before a commitment order issue.

Appellees have attacked our reliance on *Endicott-Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U.S. 285 (1925) (Br. p. 44). Actually the instant case involves fines imposed for contempt or property of persons which is protected by due process as much as "liberty." However *Endicott-Johnson* is still valid law and was not eviscerated by *Griffin* v. *Griffin*, 327 U.S. 220 (1946) and the line of cases following *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). This is the holding of *Brown* v. *Liberty Loan Corp. of Duval*, —— F. 2d —— (5th Cir., 1976, Slip Opinion, p. 6088) 45 L W 2214 (Nov. 2, 1976).* Due process does not require notice and an opportunity to be heard before wages are garnished as a post-judgment remedy. The state has an interest in facilitating the enforcement of judgments which outweighs the debtor's interest in possible statutory exemptions. Thus no special notices are required. Actual notice also is not a prerequisite. *Brown*, p. 6103. There is no due process requirement of prior notice of a writ of garnishment. Or, we might add, multiple opportunities to be heard on a contempt proceeding.

6. The affidavit of James Hurry fails to show illiteracy.

While not relevant to the disposition of the appeal, the appellants' brief alleges; p. 25, n. 30, "Hurry is illiterate." We annex Mr. Hurry's affidavit herein as a supplemental appendix in this appeal. It fails to allege illiteracy. Furthermore Hurry obviously has a driver's license as he has a car worth $1700 in repairs** which he "took" to the auto repair shop. Aff. ¶ "3". A requirement for issuance of a driver's license in New York is an "ability to read", N.Y. Vehicle and Traffic Law § 502(4).

We verified Mr. Hurry's driver's license with the Department of Motor Vehicles. This fact is "public record" while receipt of public assistance is not. Social Services Law § 136, *supra*.

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* Appellees relied at p. 56, ftn. 67 on the reversed lower court decision (392 F. Supp. 1023).

** Query—is this appellee "indigent" if he has such a valuable item of property?

CONCLUSION

The order below should be reversed.

Dated: New York, New York
November 19, 1976

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Affidavit of James Hurry.

[SAME TITLE]

JAMES HURRY, being duly sworn, deposes and says as follows:

1. Plaintiff Hurry is a citizen of the United States and the State of New York. He resides at 126 Thompson Street, Poughkeepsie, New York, with his wife and infant child.

2. Plaintiff Hurry is 40 years of age.

3. In August, 1973, Plaintiff Hurry was involved in an automobile accident. Plaintiff Hurry took his automobile to Defendant H. H. Redl's Auto Body Works to be repaired. After the automobile was allegedly repaired, the Plaintiff's insurance company paid Defendant Redl's Auto Body Works about $1600.00. Because Plaintiff Hurry had $100 deductible insurance, he owed Defendant Redl $100.

4. On or about September, 1973, Plaintiff Hurry went to Defendant Redl's to get his car that was allegedly repaired. After he paid $50.00 to Defendant Redl's, he drove the car and found that it had not been completely repaired. When he asked Defendant Redl to complete the repairs, they did not do so and Plaintiff Hurry refused to pay the final $50.

5. On June 28, 1974, a default judgment was entered in the City Court of the City of Poughkeepsie, New York, in the case *Herbert H. Redl, d/b/a H. H. Redl's Auto Body Works* v. *James D. Hurry* in favor of Herbert H. Redl and against Plaintiff Hurry for $90.43.

6. On August 8, 1974, Thomas A. Reed, Attorney for Defendant Redl served by mail a subpoena duces tecum, requiring Plaintiff Hurry to appear on August 20, 1974, before a notary public at 75 Market Street, Poughkeepsie, New Work, for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment of June 28, 1974, and to produce certain records.

7. When Plaintiff Hurry failed to appear on August 20, 1974, Defendant Juidice issued an Order to Show Cause pursuant to Judiciary Law Article 19, Section 757(1) ordering Plaintiff Hurry to appear at the Dutchess County Court on September 10, 1974, at 10:00 a.m. to "show cause why he should not be punished as for contempt for violation of and non-compliance with the said subpoena in that he failed to appear or respond pursuant thereto . . ."

8. When Plaintiff Hurry failed to appear on September 10, 1974, the hearing on the Order to Show Cause was adjourned to September 24, 1974, at 10:00 a.m.

9. When Plaintiff Hurry failed to appear in County Court on September 24, 1974, Defendant Juidice issued an Order of Contempt on October 2, 1974, pursuant to Judiciary Law Article 19, Section 770 holding Plaintiff Hurry in contempt and ordering:

> ORDERED that the said defendant James D. Hurry for his misconduct and willful contempt be and he is hereby fined the sum of $104.43 to be paid to the Plaintiff(s), besides the sum of $10.00 costs of this proceeding by paying said amount to Reed & Reed, Esqs., attorneys for the Plaintiff(s), by making installment payments in the amount of Twenty ($20.00) dollars per week, commencing one week after service of a certified copy of this order. Upon payment as

> aforesaid, the said defendant shall be deemed purged of his contempt, but in the event of his failure to pay as directed, said defendant be committed by the Sheriff of the County wherein he may be found in the County Jail of such County to remain retained there until he has paid the fine imposed as aforesaid, together with the costs and the sheriff's legal fees in connection therewith and that a warrant of commitment be issued accordingly without further notice.

10. Defendant Juidice issued the Order of Contempt based upon the following:

> Upon reading and filing the Order to Show Cause dated the 22nd day of August, 1974, with due proof of service thereof on the defendant, James D. Hurry, the affirmation of Thomas A. Reed dated the 20th day of August, 1974, and upon all the pleadings and proceedings heretofore had herein, and after hearing Reed & Reed, Esqs., Thomas A. Reed, of counsel, for the plaintiff(s) in support of said motion, and there being no opposition there to . . .

11. A copy of this Order of Contempt was served on Plaintiff Hurry's wife in November, 1974.

12. When Plaintiff Hurry failed to comply with the Order of Contempt, Defendant Juidice issued an *ex parte* Commitment Order pursuant to Judiciary Law Article 19, Section 756.

13. On or about December 19, 1974, a sheriff from Defendant Quinlan's office went to Plaintiff Hurry's home to serve the Commitment Order on Plaintiff Hurry. Because Plaintiff Hurry was not at home at the time, the sheriff notified Plaintiff Hurry's wife that he had a Commitment Order to arrest Plaintiff Hurry and that he would

return to execute the Commitment Order on or about January 2, 1975. No prior applications for similar relief have been made.

14. At the present time Plaintiff Hurry refuses to pay the fine because he maintains that Defendant Redl never properly repaired his car.

15. Plaintiff Hurry is currently unemployed. He supports himself, his wife and infant child on loans from family. Plaintiff Hurry hopes to begin receiving Unemployment Insurance Benefits in two weeks.

16. Plaintiff Hurry has over $6,000 in debts.

17. Plaintiff Hurry's assets include clothing, furniture, and an automobile, which he uses to look for work.

18. As the Order of Contempt was served upon Plaintiff Hurry's wife November, 1974, Plaintiff is in imminent danger of being imprisoned pursuant to the Order of Contempt.

• • • • • •

20. Plaintiff Hurry contends that the imposition of the fine and the punishment of imprisonment in the event the fine is unpaid is violative of his rights secured by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

21. With respect to the fine of $104.43 plus $10.00 costs, Plaintiff Hurry contends that Defendant Juidice wrongfully imposed the fine without affording him the procedural right to answer Defendant Redl's charge of contempt or to challenge the amount of the fine imposed in violation of his right to due process secured by the Fifth and Fourteenth Amendments.

22. Plaintiff Hurry has not been apprised of his right to counsel in this proceeding nor is there any provision pursuant to Article 19 of the Judiciary Law for the appointment of counsel for indigent persons faced with the imminent danger of imprisonment in violation of the right to counsel secured by the Fifth and Fourteenth Amendments.

23. Plaintiff Hurry contends that the imprisonment that may occur due to non-payment of the fine is in violation of the Eighth Amendment's ban upon cruel and unusual punishment in that the term of imprisonment is indefinite and disproportionate to the offense alleged.

s/ JAMES D. HURRY
JAMES D. HURRY

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MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AND TO PRESENT ORAL ARGUMENT AS AMICUS CURIAE AND THE BRIEF OF AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AND TO PRESENT ORAL ARGUMENT AS AMICUS CURIAE

Pursuant to Rule 42 and Rule 44(7) of the Rules of the Supreme Court, the New York State Consumer Protection Board (hereinafter, Board) respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae* and for an opportunity to present oral argument. The consent of the attorney for the appellees herein has been obtained, but the attorney for the appellants herein refuses to consent to the filing of the brief by the Board as *amicus curiae.*

The New York State Consumer Protection Board, part of the Executive Department of the State of New York, is mandated to coordinate and perform a wide range of consumer protection functions for the consumers of the State of New York. The Board has the power and duty, *inter alia*, to conduct investigations, research, studies and analyses of matters affecting the interests of consumers; to represent the interest of consumers of the state before federal, state and local administrative and regulatory agencies; to study the operation of consumer protection laws and recommend to the Governor new laws and amendments of laws for consumer protection. (N.Y. Exec.L. § 553) Pursuant to its additional responsibility of cooperating with and assisting consumers in class actions in proper cases, the Board believes this case raises constitutional issues of great importance to the consumers of the State of New York. Class action jurisdiction has been established by the District Court in this action. (J.S. 17a).

The Board offers a perspective which is not available from the parties to this action. Since 1970, when created by the Legislature, the Board has developed considerable expertise in the area of consumer credit and the problems flowing from it. The Board has drafted comprehensive legislation to modify a number of laws regulating credit in New York State, testified at legislative hearings on credit problems, and produced several pamphlets and movies on the subject.

The Board believes the constitutionality of the supplementary procedure must be reviewed with a full understanding of debt collection procedures in New York State. The impact of the challenged contempt procedure is broad and serious in that debtors entangled in the process can be incarcerated without adequate notice, actual hearing, right to counsel, and be subjected to punitive fines. Furthermore, the debtor becomes implicated in a process which ultimately leads to contempt prior to the initiation of the supplementary proceedings by the creditor. The process really

begins when the creditor commences extrajudicial efforts to collect the debt. This entire mechanism for collection of debts needs to be discussed to fully comprehend the impact and constitutional deficiencies of the challenged contempt process.

The Board is in a unique position to draw from its practical experiences and expertise and to provide this Court background to the issues in this case and to suggest practical solutions to the constitutional defects in the contempt process. We, therefore, submit that the Board has a significant interest in the case before this Court, and experience with the issues in this case which enable it to present a brief *amicus curiae* and oral argument which will aid the Court in its deliberations.

Respectfully submitted,

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30 September 1976

Summary of Argument

New York State's contempt process authorizes the incarceration of a judgment debtor for not appearing in response to an information subpoena or subpoena to appear for examination as to assets. (N.Y. JUDICIARY LAW Sections 756, 757, 770, 772, 773, 774 and 775). The procedure under N.Y. JUDICIARY LAW Section 757(1) authorizes issuance of an order to show cause in contempt cases. If a debtor does not appear in response to the order to show cause, he may be committed to jail without further opportunity to appear before the court.

The New York contempt procedure violates the Due Process Clause of the Fourteenth Amendment on four grounds: the subpoenas and the order to show cause do not provide adequate notice of the potential fine and imprisonment; the person accused of contempt may be committed to jail for as long as 90 days without ever being physically present at a hearing; the person incarcerated for contempt is not informed of his right to counsel and when indigent is not assigned counsel; and the sanctions imposed under the challenged statutes are punitive.

The New York State Consumer Protection Board relies on the arguments in appellees' brief to demonstrate the unconstitutionality of the cited provisions of the JUDICIARY LAW but contends that the requirements of due process must be judged against the entire background and context for the use of the contempt process in appellees' state court cases. This brief is designed, among other purposes, to provide such background and context. A debtor entangles himself or herself in the complicated collection process as soon as default under a credit agreement takes place. Assessment of the procedural protections required depends upon a full understanding of the entire mechanism for collection of a debt.

The Court should consider the entire process for collection of a debt beginning with the panoply of extrajudicial collection practices, many abusive, confusing and illegal. The collection process continues through service of an obtuse summons; the entry of a default judgment in most consumer credit actions, often without the knowledge of the debtor and about which the debtor is never informed, and concludes with supplementary proceedings to collect the judgment which at times includes use of the challenged contempt process.

The debtor's confusion and mistakes which often create the opportunity for accusing him or her of contempt of

court are related to the same factors which lead to default judgments.

With this background, the inescapable conclusion crystallizes that the Due Process Clause mandates substantial procedural protections prior to incarceration and deprivation of liberty of a judgment debtor.

It is feasible to provide clear notice of potential fine and imprisonment, to bring the debtor physically before the court after apprehension and before commitment to jail, and to assign an indigent debtor counsel before committing him to prison.

I. The constitutionality of the contempt process must be considered in the context of the total scheme for collection of debts

The lower court in this case held seven sections of N. Y. Judiciary Law Article 19 which governs Contempts in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1]

The constitutionality of the contempt procedures challenged in this case must be reviewed with a full understanding of the total scheme for collection of debts, once a default takes place.

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1971).

The New York State Consumer Protection Board submits that the degree of procedural safeguards required in

[1] *Vail* v. *Quinlan*, 406 F. Supp. 951 (1976).

this case depends on the entire circumstances of the case including the background described in this brief. The supplementary proceeding challenged in the case before the Court involves the last judicial step to collect a debt, the use of contempt and incarceration. However, the procedures for collection start when the debtor defaults. Regardless of the circumstances or defenses of the debtor, he or she is usually subjected to a barrage of confusing and intimidating notices, letters, telephone calls, personal visits and legal notices and documents[2] which continue without interruption to the day the creditor considers the debt worthless or the debtor either pays or finds himself or herself incarcerated in effect for the failure to respond to the "last" notice, the order to show cause.

The case before the Court is not simply a situation where the debtor did not respond to a subpoena issued by the creditor's attorney and an order to show cause issued by the state supreme court in New York. Instead, the case brings before the Court the total scheme for collection of debts which begins with extrajudicial collection practices and continues with the service of a summons and complaint, the entering of a default judgment, and finally, the enforcement of the default judgment. Many debtors find themselves caught in this complex and lengthy procedure to collect a debt, even though the debtor may have defenses and relevant and compelling mitigating circumstances.

The purpose of this brief is to demonstrate that many debtors find themselves in default for reasons beyond their control and just do not know how to extricate themselves

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[2] D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 177-183 (1974) (hereinafter CONSUMERS IN TROUBLE); R. NEEDHAM AND L. POLLOCK, COLLECTING CLAIMS AND ENFORCING JUDGMENTS 59-65 (1969) (hereinafter NEEDHAM AND POLLOCK); A. RUBIN JR., FUNDAMENTALS OF THE COMMERCIAL PRACTICE 45-54 (1965).

from the procedural quagmire. The New York State Consumer Protection Board urges the Court to affirm the District Court and to insure the appellees adequate procedural protection during supplementary proceedings for the collection of money judgments prior to the debtor's deprivation of liberty and incarceration.

II. The extension of credit and the prejudgment collection process are an essential part of the context which the Court should consider

A. Creditors Persuade Consumers To Buy Now, Pay Later By Enticing Consumers With "Easy Credit"

Consumer credit has grown astronomically over the past twenty-five years. Total installment credit outstanding in the United States has increased from $14.7 billion[3] in 1950 to $162.2 billion in April of 1976 (1100 percent).[4] In comparison, between 1950 and the first quarter of 1976 both GNP and personal income increased by less than 600 percent.[5]

Consumer credit has become an integral part of this country's economy and has been a significant factor in raising the general standard of living by allowing consumers to make purchases based on future earning power. Unfortunately, some consumers, enticed by offers of "easy" credit, find themselves burdened with monthly payments and mounting interest charges which exceed a level that their future income can support.

> "Through mass media, Americans in *all* walks of life are bombarded with messages to buy now and pay

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[3] STATISTICAL ABSTRACT OF THE UNITED STATES 1975 475 (1975) (herinafter STATISTICAL ABSTRACT).

[4] FED. RESERVE BULL. A 46 (June 1976).

[5] STATISTICAL ABSTRACT, *supra* note 3 at 380, 386; 56 SURVEY OF CURRENT BUSINESS 3, 7 (U. S. Dept. of Commerce No. 5 1976).

later. 'Easy payments' and 'no money down' are slogans luring even the poor into the marketplace, and in spite of the low credit status of the poor there are numerous merchants who are prepared to extend them credit. Nor is it very difficult to lure the poor into making costly purchases, for in some ways ownership of goods takes on even more significance for low-income persons than for those in higher income brackets. Since the poor have little prospect of greatly improving their low social standing through occupational mobility, they are apt to turn to consumption as at least one sphere in which they can make some progress toward the American dream of success."[6]

Credit suppliers often "sell" credit to consumers as if it were a commodity unto itself rather than a means of purchasing goods and services.

"A recent issue of *American Banker,* a trade newspaper, told how a chain of banks planned to increase the value of its installment loans outstanding by 15% in 90 days. The approach was comprehensive, a quarter of a million dollars for an advertising blitz via radio, TV, newspapers, direct mail, envelope stuffers, telephone solicitations, and cash rewards to bank employees for each loan they personally produced. The campaign theme was blunt and direct: 'We've got $25,000,000 to loan. Get yours.'"[7]

The grantors of credit are motivated to expand the credit market by the profits to be earned from the extension of credit. The lending of money has become a lucrative business. In some cases, "the low income buyer is extended

[6] Caplovitz, *Consumer Credit in the Affluent Society,* 33 LAW & CONTEMP. PROB. 641, 647 (1968).

[7] *Don't Let The Credit Pushers Trap You,* CHANGING TIMES 16 (April 1976).

credit, without regard to other demands on his income, because it is profitable for the creditor to do so, even though the calculated proportion of default may be high.'"[8]

All too frequently credit is extended to consumers imprudently and haphazardly without regard for need, desire or propriety. During the bank credit card boom of the 1960's, unsolicited cards were mailed first to bank customers, including thousands of children; then, as competition grew, to all taxpayers; then to all registered voters; and finally to everyone in the phone book.[9] Finally, Congress made it illegal to mail unsolicited credit cards as of October, 1970.[10] As recently as April of this year however, the New York State Attorney General received complaints that Britts Department Store, a nationwide chain, had sent credit cards to consumers who neither applied for nor requested cards and did not want them. The cards had been sent solely on the basis of a telephone solicitation in which consumers were not directly asked whether or not they desired a credit card.[11]

Obtaining a charge account can be as easy as filling out an application—even having an income is not necessarily a prerequisite, as was proven by a Troy, Michigan, man. He filled out a completely honest application for his pet dog—listing her age as 2.7 years (mistaken by the store as an "ideal" 27), leaving the question about social security number and income blank, and giving her occupation as "watchdog". The store promptly issued

[8] Note, *Sewer Service and Confessed Judgments: New Protection For Low-Income Consumers,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 414, 414 n.3 (1971) (hereinafter *Sewer Service*).

[9] A. GRIFFIN, THE CREDIT JUNGLE 21 (1971) (hereinafter THE CREDIT JUNGLE).

[10] Consumer Credit Protection Act, 15 U.S.C.A. § 1642 (1970). See also N.Y. GEN. BUS. LAW § 515 (McKinney Supp. 1975); THE CREDIT JUNGLE, *supra,* note 9 at 33.

[11] *Unrequested Credit Cards Rapped,* Syracuse Post Standard, April 26, 1976, at 2, col. 1.

a valid credit card, entitling her to all charge account privileges.[12]

A June, 1974, survey of nine lending institutions in the Albany, New York, area—six loan companies and three banks—found loan counselors generally quick to give credit rather than sound financial advice on how to live within one's means.[13]

B. Most Default Debtors Are Not Irresponsible And Do Not Disregard Their Legal Responsibilities

The underlying question which permeates all defaults in consumer credit transactions is why did the debtor stop making payments. Many creditors characterize default debtors as "deadbeats" and "skips", people who ignore their legal responsibilities and lie and cheat to achieve this end.[14] This archaic assumption about default debtors tends to tarnish and bias any objective analysis of a consumer credit transaction and the reasons for any default thereunder.

David Caplovitz, a professor at the Graduate School and University Center of the City University of New York, specifically addressed this critical question—why do debtors default?—in an extensive study, CONSUMERS IN TROUBLE, A STUDY OF DEBTORS IN DEFAULT (hereafter CONSUMERS IN TROUBLE).[15]

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[12] THE CREDIT JUNGLE, *supra*, note 9 at 52.

[13] Basler and Basler, *Credit Too Quick by Some Local Loaners?*, Knickerbocker News (Albany, New York), June 12, 1974, § B, at 1, col. 2.

[14] CONSUMERS IN TROUBLE, *supra*, note 2 at 9; S. SHERWIN, HOW TO COLLECT A MONEY JUDGMENT 11 (1975) (hereinafter SHERWIN); A. TANNRATH, HOW TO LOCATE SKIPS AND COLLECT 59 (1948).

[15] Professor Caplovitz and his staff interviewed in detail 1,333 default debtors. Sample is from court records in New York,

(footnote continued on following page)

Professor Caplovitz concluded that only five percent of the sample defaulted for reasons based on the debtor's irresponsibility[16] where the default stemmed primarily from unwillingness to pay, not inability to pay. Professor Caplovitz found that major cause for default, in 48 percent of the cases, was loss of income, resulting from such factors as adverse employment change, illness to chief wage earner and loss of secondary wage earner's income.[17] He further learned that 35 percent of the debtors gave reasons

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(footnote continued from preceding page)

Chicago, Detroit and Philadelphia. The survey was limited to transactions for merchandise and personal loans. See *Consumers in Trouble*, Appendix B for analysis of the methodology for the study and his solutions to possible bias and the results.

[16] The following table, extracted from Caplovitz's study, CONSUMERS IN TROUBLE, *supra* note 2 at 53, summarizes the findings of the study:

Table 4.1 / Major Categories of Reasons for Default (percent)

Debtor's mishaps and shortcomings	*first reason*	*second reason*	*third reason*	*total reasons*	*total individuals*
Loss of income	43	19	10	24	48
Voluntary overextension	13	23	32	17	25
Involuntary overextension	5	12	7	7	11
Marital instability	6	4	5	5	8
Debtor's third parties	8	4	6	6	9
Debtor irresponsibility	4	2	—	4	5
Creditor may be implicated					
Fraud, deception	14	13	15	14	19
Payment misunderstandings	7	3	—	6	8
Partial late payments	—	15	6	5	7
Item returned to creditor	*	6	14	2	4
Harassment by creditor	—	1	5	1	1
All other (miscellaneous)	1	—	—	*	*
Total percent	101	101	101	101	145
N	(1,320)	(570)	(110)	(2,000)	(1,326)

* Signifies less than ½ of a percent

[17] CONSUMERS IN TROUBLE, *supra*, note 2 at 57.

for their default which implicated the creditor in varying degrees.[18]

Professor Caplovitz states in his book that:

> "In almost four of five cases the primary reason for the default reflects upon the debtor; the creditor is implicated in more than 20 percent of the primary reasons. Almost all the primary reasons involving the creditor refer to either fraud or payment misunderstandings. The more dubious categories, such as accounts of partial payments and merchandise that reverted to the seller, rarely show up as primary reasons. Table 4.2 also shows that creditors are more likely to be implicated in secondary reasons than in primary ones. Many debtors admitted that they fell behind because of loss of income, but then added that they were also reluctant to pay because they felt that they had been cheated. Of all the reasons offered, about 27 percent fall into the categories in which the creditor is likely to be at least partly to blame. Finally, from the last column we learn that although four of every five debtors gave at least one reason for their default that reflects their own shortcomings, more than a third gave at least one reason that implicated the creditor as well.'"[19]

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[18] *Id.* at 91.

[19] *Id.* at 55.

Table 4.2 / Summary: Classification of Reasons by Locus of Blame (percent)

locus of blame	*first reason*	*second reason*	*third reason*	*total reasons*	*total individuals*
Debtor's mishaps and shortcomings	79	63	60	74	80
Creditors may be implicated	22	38	40	27	35
Total percent	101	101	100	101	115
N	(1,320)	(570)	(110)	(2,000)	(1,326)[a]

[a] These percentages are computed in the same way as in Table 4.1. Regardless of the number of debtor's mishaps categories that apply to a given person, the debtor is counted only once. The same is true for the creditor-related categories. As a result, these percentages total 115 percent rather than 145 percent as in Table 4.1.

Professor Caplovitz's findings on the reasons for default by debtors is supported by a more limited study by Professor H. Lee Matthews on the causes of personal bankruptcies.[20] He concluded that only 13 percent of the sample filed bankruptcy because of the debtor's irresponsibility, while 48 percent of the sample was forced into bankruptcy by catastrophic events.[21]

Though neither study tried to isolate differences between default debtors against whom judgments have been filed and debtors who file personal bankruptcies, the similarities in the findings of both studies further demonstrate that many and probably most debtors default for reasons other than disregard for his or her legal responsibilities.

For further discussion of the relationship between the incidence of default and bankruptcy, see Mitchell *Bankruptcies Up 40 Percent in Area,* Elmira Star Gazette, January 5, 1976 at 9.

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[20] Causes of Personal Bankruptcy, (1969) (hereinafter Causes of Personal Bankruptcy), Matthews' studied the filing of personal bankruptcies in the Eastern Division of the Southern District of Ohio in the first six months of 1964. Matthews' findings are contained on the following table:

Table 4.1—Distribution of Personal Bankrupts by Hypothesized Causes of Bankruptcy

Hypothesis	*No. of Cases*	*Percent of Total*
A significant change in the income of a consumer due to unemployment, seasonal employment, or personal injury	20	13
An involuntary assumption of debt due to catastrophic events such as:		
Medical expenses	28	18
Marital difficulties	39	26
Personal liability suits	6	4
Lack of prudent financial management leading to spending beyond the capacity to repay	40	26
An attitude system which consists in part of a lack of responsibility toward paying debts	19	13

Source: Data collected in interviews.
Id. at 53.

For further discussion of the relationship between the incidence of default and bankruptcy, see Mitchell *Bankruptcies Up 40 Percent in Area,* Elmira Star Gazette, January 5, 1976 at 9.

[21] Causes of Personal Bankruptcy, *supra* note 19 at 53.

C. Creditors Employ A Variety Of Extrajudicial Collection Practices To Procure Repayment Of A Debt In Default

As soon as the creditor entices the debtor to procure the credit, and succeeds in persuading the debtor to buy now and pay later, the creditor begins collecting the debt. Usually the contract for the debt includes the terms for repayment, such as an installment plan or lump sum arrangement. When the debtor defaults under the terms of the credit agreement for whatever reason, the creditor promptly initiates an organized, comprehensive and vigorous program for collection of the debt[22] by utilizing a wide range of extrajudicial collection techniques.[23]

The Code of Ethics and Operations of the American Collectors Association, Inc.[24] carefully details the ethical limitations applicable to efforts to collect a debt from a default debtor.[25]

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[22] For discussion of creditors' collection practices see works cited, *supra* note 2; also see A. 67a.

[23] FEDERAL TRADE COMMISSION, NEW YORK REGIONAL OFFICE STAFF REPORT ON DEBT COLLECTION HEARINGS (1973) (hereinafter, *Staff Report*); HEARINGS ON H.R. 11969 BEFORE THE SUBCOMMITTEE ON CONSUMER AFFAIRS OF THE HOUSE COMMITTEE ON BANKING, CURRENCY AND HOUSING, 94th Cong., 2nd Sess. (1976).

[24] AMERICAN COLLECTORS ASSOCIATION, INC., THE DIRECTORY OF THE AMERICAN COLLECTORS ASSOCIATION, INC. BONDED COLLECTORS 10 (1975).

[25] IN HIS RELATIONSHIP WITH CONSUMERS, EACH ACA MEMBER SHALL:

> Show due consideration for the misfortunes of consumers in debt and deal with them according to the merits of their individual cases.
>
> Do everything reasonable to assist the consumer in the solution of any financial problems he may have and to help him to have a better understanding of the use of credit and importance of using it wisely, by utilising appropriate channels of communication, including programs of consumer education.

(footnote continued on following page)

However, the division between these ethical guidelines and outright abusive conduct is both thin and difficult to define. Unfortunately, many collection practices teeter between the ethical and the abusive and eventually surface as abusive tactics designed to harass the debtor until payment is made.

The existence of these coercive tactics and their relatively frequent use has been widely recognized.[26]

(footnote continued from preceding page)

> *Avoid deceptive practices, statements, or materials which would cause the consumer to believe that he was dealing with someone other than the collector.*
>
> Provide effective channels for receiving and acting on consumer complaints and suggestions, including but not limited to utilizing the resources of its Association, Chamber of Commerce, Better Business Bureau, recognized consumer groups, and other appropriate bodies.
>
> In the event of a disputed account, make available to the consumer all related supporting information and documents with an explanation of all charges, and provide trained personnel to assist the consumer and/or creditor-client in attempting to resolve any existing dispute regarding his account.
>
> When a consumer absolutely refuses to pay or even discuss an account, cease further direct efforts with the exception of advising the consumer that the collector's further efforts are being terminated and that there is a possibility of the creditor's attorney invoking the creditor's remedies locally available.
>
> Not publish, post, or cause to be published or posted any list of debtors commonly known as a "deadbeat list" for the purpose of forcing or attempting to force collection thereof.
>
> Cooperate with qualified community counseling services and other appropriate agencies and refer consumers to them as such needs appear.
>
> *Make telephone and personal calls during such hours and with such frequency as would be regarded reasonable.* (emphasis supplied) *Id.*, at 11-12.

[26] *See generally, Staff Report, supra* note 23 at 2-96; HOUSE COMMITTEE ON BANKING, CURRENCY AND HOUSING, DEBT COLLECTION PRACTICES ACT REPORT, H.R. REP. No. 1202, 94th Cong., 2nd Sess. (1976) (hereinafter, HOUSE REPORT); B. CLARK AND J. FONSECA, HANDLING CONSUMER CREDIT CASES, 109-121 (1975) (hereinafter, CLARK).

While one commentator has enumerated what he calls the "twelve deadly sins of credit collection,"[27] the range of abusive tactics available seems to be limited only by the imagination of the collector. Frequently used are the following: threatening force or violence, threatening legal action when it is beyond the collector's power to sue or when there is no intent of doing so,[28] communicating with third parties (friends, relatives, employers), making public denunciations, simulating governmental status, simulating legal process (and/or using legalese), threatening to repossess without intent to do so,[29] threatening credit ratings, attempting to or collecting disputed or nonexistent debts, communicating with unreasonable frequency or at unreasonable times, using obscenity, continuing to communicate with the debtor when an attorney has been retained and continuing dunning notices or allowing a computer to continue dunning notices or add finance charges after being made aware that the debt is disputed.[30]

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[27] Testimony of Henry Stern, First Deputy Commissioner of the New York City Department of Consumer Affairs, *Hearings Before the Joint (N.Y.) Legislative Committee on Consumer Protection on Debt Collection Practices* 65, 70-73 (December 11, 1972) (hereinafter *Hearings, December 11, 1972*).

[28] Since a collector will typically receive compensation only if he is successful, there is an incentive to use whatever means he can think of to collect without a lawyer's involvement.

[29] It is interesting to note that only eight percent of default cases result in repossession, so the threat is rarely made with intent to do so. Primarily, this is due to the relatively low resale value of consumer goods. Nonetheless, the tactic is productive because the low-income debtor knows that replacement cost is very high. *See, Staff Report, supra* note 23 at 19.

[30] *See*, generally, Stern, *Hearings, December 11, 1972, supra* note 27; testimony of Richard A. Dutcher, Assistant Attorney General, State of New York, *Hearings Before the Joint (N.Y.) Legislative Committee on Consumer Protection on Consumer Debt Collection Practices* 4 *et. seq.* (December 7, 1972) (hereinafter *Hearings, December 7, 1972*); *Staff Report, supra*, note 23 at 18; CONSUMERS IN TROUBLE, *supra* note 2 at 177, 189; also see A. 46a.

Such harassment tends to coerce a debtor into paying irrespective of the validity of the debt,[31] the existence of valid defenses,[32] or the status of the debtor as judgment-proof.[33] The reasons are clear: fear of bodily harm, ruined reputation, loss of employment[34] or even embarrassment; the feeling that nothing can be accomplished by contesting; ignorance of what protections the law affords; and inability to afford an attorney. Richard A. Givens, New York Regional Director, Federal Trade Commission, has stated:

> "Some may ask, 'Why is the Government protecting deadbeats?' or, put in another way, 'Haven't we, as businessmen, the right to use any and all means to collect from persons we have been good enough to extend credit to?' These are fair questions. But we have found that in numerous instances the collection tactics I have described here today are used against

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[31] Such harassment could occur where the amount has been paid, and there is a computer error and the amount was never owed or the services were performed under warranty or other agreement.

[32] Such valid defenses would occur where an insurer is liable or the product is defective. *See*, i.e., 16 C.F.R. Part 433 (Preservation of Consumers' Claims and Defenses), and discussion thereof at 40 Fed. Reg. 53506 *et. seq.* (November 18, 1975) and Federal Trade Commission, *Staff Guidelines on the Trade Regulations Rule Concerning Preservation of Consumers' Claims and Defenses* (1976).

[33] Many states exempt from satisfaction of money judgments items of personality and realty, which, depending on the debtor, may comprise all his assets. *See* N.Y. CPLR §§ 5205, 5206. (McKinney 1975). Furthermore, current income derived from Social Security, Welfare or Unemployment Insurance is exempt. 42 U.S.C.A. 407 (1974); SOCIAL SERVICES LAW § 137-a (McKinney 1976); LABOR LAW § 595 (McKinney 1965).

[34] Typically, an employer will deem an employee irresponsible if he has outstanding debts. Both civilian and military federal employees are subjected to such pressure. *See*, Civil Service Commission, *The Federal Personnel Manual*, Chapter 735, subchapter 2-7, cited at *Staff Report, supra* note 23 at 53-57; *Staff Report, supra*, note 23 at 57-61.

persons who, in fact, would have had a valid defense to the charge of non-payment—such defenses as defective merchandise or service, non-delivery or return of the item, prior payment, or an honest dispute about payments, and similar defenses. Unfortunately, these tactics help, in many instances, dishonest operators to collect for the sales of goods and services for which they ultimately would not collect if the debtors had 'their day in court.' For instance, it is easy to understand why a debtor would pay even an unjust debt if his employer becomes involved in the collection process. Obviously, he would rather pay a claimed debt than chance losing his job. The same holds true for the various threats used by some creditors or collection agencies."[35]

Many jurisdictions have adopted remedial legislation in response to these abusive practices, ranging from the broad and severely restrictive licensing and prohibited practices, found in California[36] and Minnesota[37] through the private right of action in Texas,[38] to the regulatory

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[35] Remarks of Richard A. Givens, Regional Director, New York Region, Federal Trade Commission, submitted to *Hearings, December 11, 1972, supra* note 27 at 61.

An indication of public importance is provided by the report broadcast on *Sixty Minutes* (C.B.S., September 19, 1976), wherein continuing abusive practices in Minnesota were discussed. Minnesota has one of the best deceptive collection practice statutes, *infra*, note 36.

[36] West, CAL. ANN. BUS. & PROF. CODE Article 10. *See*, particularly, § 6947. *See also*, § 17538.7.

[37] M.S.A. § 332.31 *et seq*. *See*, particularly, § 332.37.

[38] Vernon's Ann. Civ. St. art. 5069-11.01 through 11.11. *See*, particularly, §§ 11.02, 11.03 and 11.10. *See also, Ledisco Financial Services, Inc.* v. *Viracola*, 533 S.W. 2d 951 (Ct. Civ App., Texarkana, 1976), approving the statutory private right of recovery.

scheme of Massachusetts[39] and the prohibited practices statute of New York.[40] In addition, under its broad general grant of powers,[41] the Federal Trade Commission has attempted to reduce the incidence of abuse in interstate commerce, both by regulation[42] and administrative action.[43]

New York's Debt Collection Procedures statute is probably typical, listing nine prohibited practices and making violation a misdemeanor, enforceable by the Attorney General or District Attorneys. The problems, however, are many. Not only are some major abuses not proscribed,[44] but the statute as it stands is difficult to enforce with no private remedy.[45]

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[39] M.G.L.A. c. 93 § 24 *et. seq*. *See*, particularly, § 49. *See also*, M.G.L.A. c. 272 § 97 A and 1969 Regulations of Commissioner of Banks, 35 UNAUTHORIZED PRACTICE NEWS 27 (December 1970).

[40] N.Y. GENERAL BUSINESS LAW Article 29-H (McKinney Supp. 1975). *See*, particularly, § 601.

[41] 15 U.S.C.A. §§ 45, 46 (1973). A more specific grant of authority is contained in H.R. 13720/S. 3838, which has passed the House, but has just been introduced in the Senate where no action is expected in the 94th Congress.

[42] *Guides Against Debt Collection Deception*. 16 C.F.R. Part 237 (1968).

[43] *In re Nosoma Systems, Inc.* (File No. 732 3348, 1976) is the most recent case in which a consent decree has been signed. *See also*, for example, *In re Inter-Continental Services Corp., et al.* (File No. 752 3195, 1975); *In re State Credit Association, Inc., et al.* (File No. 732 3104, 1975); *In re CTC Collections, Inc., et al.* (File No. 752 3106, 1975), indicating an extremely large volume of such practices which have been discovered by the FTC.

[44] Omissions include public denunciation when the information regarding the debt or creditworthiness is not known to be false, continued communication with a debtor after an attorney has been retained, threatening the use of force or violence, and using obscenity.

[45] In *State of New York* v. *I.C. System, Inc.*, 46 A.D.2d 873, 361 N.Y.S.2d 930 (1st Dept., 1974), *aff'd* 38 N.Y.2d 767, 381

(footnote continued on following page)

The pattern set by the extrajudicial collection practices just described continues through collection by judicial action. The confusion of debtors by the multiplicity of papers received and contacts made is a recurrent feature of this pattern.

D. Over Ninety Percent Of Collection Actions End With A Default Judgment And Most Of These Judgment Debtors Do Not Know A Default Judgment Has Been Entered

When the extrajudicial methods of collection fail, creditors usually initiate suit for collection of the debt. Under New York Law, an action is commenced by the service of the summons.[46]

The vast majority of consumer credit actions in New York and throughout the country end in default judgment. Over 90 percent of New York City consumer actions result in default judgments.[47] One study of 23 New York City collection attorneys revealed that in one three-month period, 15 of the 23 obtained default judgments in 100 percent of the consumer lawsuits they initiated. Another

(footnote continued from preceding page)

N.Y.S.2d 55 (1975) the Attorney General sought an injunction against Respondent's use of a series of seven form letters. "It is the number, frequency and nature of these letters that led the Attorney General to conclude that they tended to be deceptive and misleading to the debtors and to be of the harassing nature which the new 'Debt Collection Procedures' Statute, particularly, was intended to prevent." Main Brief for Petitioner-Appellant in the Court of Appeals at 4. The Brief also indicated specific objections to each letter in light of that act and the EXECUTIVE LAW § 63(12). *Id.*, at Appendix C.

Having recognized the problem, some jurisdictions have now declared coercive tactics actionable under the rubric of intentional infliction of emotional harm. In New York, *Long* v. *Beneficial Finance Co.*, 39 A.D.2d 11, 330 N.Y.S.2d 664 (4th Dept., 1972), seems to stand alone for that proposition.

[46] N.Y. CPLR § 304 (McKinney Supp. 1975).

[47] *See, Staff Report, supra* note 23 at 116.

attorney ". . . estimated that he instituted 7,000 lawsuits annually of which 90 percent resulted in default." Federal Trade Commission, New York Regional Office Staff Report of Debt Collection Hearings 164-165 (1973). A study of two New York City retail furniture stores revealed that in 1971 they alone accounted for 831 default judgments.[48] A study of imprisonment for debt in Onondaga County revealed that most of the judgments won by creditors in the cases studied were by default.[49] In the case now before the Court, appellees Vail, Ward, McNair, Hurry, Nameth, Humes and Harvard had default judgments taken against them. (A. 13a, 20a, 25a, 55a, 58a, 64a).

The reasons for this excessively large number of defaults can be attributed in major part to at least four complex causes: incomprehensible summons; "sewer service" of the summons; complex legal procedures and lack of available legal representation; and improper venue for the case.

(i) The Summons Form Is Confusing And Complex And Does Not Provide Notice Of The Lawsuit Nor The Responsibilities Flowing From It

David Caplovitz's study, CONSUMERS IN TROUBLE, A STUDY OF DEBTORS IN DEFAULT, revealed that where service of the summons was completed, 15 percent of these defendants simply did not realize that a lawsuit had been commenced against them, or if they did, did not know how to properly respond.[50] Caplovitz's study further disclosed

[48] Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J. OF L. AND SOC. PROB. 370, 371 n.11 (1974) (hereinafter *Due Process Denied*).

[49] Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York*, 24 SYRACUSE L. REV. 1217, 1225 (1973) (hereinafter *Imprisonment for Debt*).

[50] *Consumers in Trouble, supra* note 2 at 205.

that only four percent of the New York City defendants, who were actually served, answered, as compared with 36 percent in Chicago and 34 percent in Detroit.[51] This result is attributable in large measure to the archaic and confusing form used in New York as compared to the noticeably simpler and easier to understand forms used in the other jurisdictions.

In 1973, the New York Regional Office of the Federal Trade Commission published a report of the testimony and public hearings held on the subject of debt collection practices in the New York, New Jersey and Connecticut region. Considerable emphasis was placed on the role of the judicial process in debt collection.[52]

Most witnesses who testified on the matter, including legal services attorneys and collection attorneys, agreed that the language of the summons was too difficult to understand, especially for an uneducated consumer.[53] Professor David Caplovitz testified that his studies demonstrated that many defendants do not understand what the summons says because:

> "The language of the summons, especially in New York, virtually defies understanding and . . . even a well-educated person would have difficulty understanding the message of the summons."[54]

In 1971, a pilot study, sponsored by the New York City Consumer Protection Coordinating Committee, was conducted respecting default judgments in the New York City area.[55] Several attorneys subpoenaed to testify indicated

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[51] *Id.*, at 204.

[52] *Staff Report, supra* note 23.

[53] *Id.*, at 119.

[54] *Id.*

[55] *Id.*, at 160.

that one reason for the high percentage of defaults was a "lack of understanding about the summons itself."[56] Many defendants "do not understand the effect of a failure to answer the summons because of its highly technical language."[57]

In 1972, a report by the New York City Bar Association's Special Committee on Consumer Affairs declared that "... procedural defects often approach the outrageous and their impact is greatest upon the poor."[58] One defect considered was the "antiquated forms of summons and complaint which even when properly served, failed to alert the consumer to the fact and seriousness of the suit."[59]

In 1973, an empirical study[60] was conducted in Onondaga County, New York, to determine whether New York's statutory scheme for the enforcement of money judgments provided low income debtors with effective protection of their right to due process of law. Over 10 percent of the debtors interviewed as part of this study were confused as to whether they had received the summons and what it meant.[61] In other words, they did not know they were being sued. Several subjects of the study felt they had adequately "answered" the summons by calling the creditor or the creditor's attorney.[62]

The study concluded that the present system fails to provide adequate notice to the debtor of the nature and

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[56] *Id.*, at 165.

[57] *Id.*, at 166.

[58] Committee Report, The Special Committee on Consumer Affairs, *Toward the Informal Resolution of Consumer Disputes*, 27 Rec. of N. Y. C. B. A. 419, 420 (1972).

[59] *Id.*, at 421.

[60] *Imprisonment for Debt, supra* note 49.

[61] *Id.*, at 1233.

[62] *Id.*, at 1234.

consequences of the impending lawsuit."[63] The study suggests that:

> "Many defaults are due to the debtor's inability to understand his legal rights rather than a voluntary waiver of them. Simplified language may not eliminate all such problems, but its benefit clearly outweighs the minimal cost that would be involved in promulgating a new statutory form.'"[64]

The confusing summons form produces the same due process deficiency challenged in the case before the Court—the absence of clear, understandable notice.

(*ii*) *Some Summons Are Never Served On The Debtor But Instead Are "Sewer Served"*

Increasingly in recent years, commentators, community groups and the government have been concerned about the degree to which consumer defendants are not served with summons.[65] The causes are numerous, including a server's deliberate policy of maximizing profits by taking on more jobs than he can actually handle or than he wishes to,[66] and his fear of entering the area of residence (frequently the

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[63] *Id.*, at 1242.

[64] *Id.*, at 1241.

[65] *Due Process Denied, supra* note 48 at 383 & n.56.

[66] This may be concluded from such evidence as one server claiming in affidavits in different cases to have made service in Brooklyn and the Bronx within ten minutes (Givens, *Hearings, December 11, 1972, supra*, at 59); the surveillance by postal inspectors showing that a server never left lower Manhattan on days he claimed to have served defendants in thirty-two cases at geographically distant locations [Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972); *United States* v. *Wiseman*, 445 F. 2d 792 (2nd Cir., 1972)]; and the routine signing and notarizing of blank affidavits (*Staff Report, supra* note 23 at 184).

inner city) or actually confronting the defendant.[67] Whatever the cause, the abuse has become widespread, with papers frequently being literally dumped in the street or left in vestibules[68] and false affidavits routinely being filed.[69] The magnitude of the problem has been recognized by State and Federal Courts alike, in civil and criminal matters.[70]

The consequence has been the perpetration of a fraud on the court in each such instance; unknowingly, the court will then become a partner in the denial of one of the most basic of all rights. As this Court declared in *Schroeder* v. *City of New York*:

> "As was emphasized in *Mullane*, the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. 'This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'"[71]

The dimensions of the abuse and gravity of the deprivation of the rights of consumer debtors caused the State of New York to act. In the new Penal Law promulgated in 1965, false swearing in an affidavit was rendered a Class E

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[67] *Staff Report, supra* note 23, at 100, 114-115.

[68] *Clark, supra* note 26, at 115; *Staff Report, supra* note 23, at 98-105, indicating the problem exists in many urban areas.

[69] *United States* v. *Wiseman*, 445 F. 2d (1971); *United States* v. *Barr*, 295 F. Supp. 889 (S.D.N.Y., 1969); *United States* v. *Brand Jewelers*, 318 F. Supp. 1293 (S.D.N.Y., 1970); *A.B.C. Process Serving Bureau Inc.* v. *City of New York*, 63 Misc. 2d 33, 310 N.Y.S. 2d 859 (Sup. Ct., N.Y. Co., 1970); *Judo, Inc.* v. *Peet*, 68 Misc. 2d 281, 326 N.Y.S. 2d 441 (Civ. Ct., N.Y. Co., 1971); *Central Budget Corp.* v. *Knox*, 62 Misc. 2d 66, 307 N.Y.S. 2d 936 (Civ. Ct., N.Y. Co., 1969).

[70] See cases cited in note 69, *supra*.

[71] 371 U.S. 208, 212 (1962).

felony."[72] This was insufficient, however, to end the practice, as was the licensing of process servers required by New York City beginning in 1969."[73]

Testimony, comment and court decisions indicated the need for further action, and New York in 1973 became the first state to attempt to put an end to the practice legislatively,"[74] by adding a requirement that an affidavit contain a physical description of the person served"[75] and mandated that process servers keep certain records."[76] In approving this legislation, the Governor stated:

> "There is, perhaps, no more despicable a corruption of our system of civil justice than the practice known as 'sewer service.' In 1970, historic legislation was enacted allowing for the mailing of a summons to a defendant coupled with delivery of the summons to a person of suitable age and discretion at the defendant's home or place of employment. While the 1970 law has helped to reduce the incidence of 'sewer service,' the practice has not been totally eliminated.
>
> This bill represents a significant step towards the total elimination of the practice of 'sewer service' and the invidious effect it has on the rights of defendants. In addition to protecting the individual defendant in a specific case (since the affidavit of proof of service will be immediately before the court), the bill establishes a general deterrent to the practice of 'sewer service' by requiring process servers to keep records of their activities."[77]

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[72] N.Y. PENAL LAW § 210.40. (McKinney 1975).

[73] N.Y. CITY ADMIN. CODE Ch. 32, art. 43 (1969).

[74] *Sewer Service, supra* note 8, at 420.

[75] N.Y. CPLR 306(b) (McKinney Supp. 1972).

[76] GENERAL BUSINESS LAW, Article 8, L. 1973, c.397.

[77] Memorandum on Approving L. 1973, c.397 (June 5, 1973) [McKinney's 1973 Session Laws, Vol. 2 at 2344].

How effective such statutes will be is open to question, as evidenced by the post-enactment dispute over the subsidiary question of admissibility of a process server's affidavit, and the decisions thereon in *Queensboro Leasing* v. *Resnick*[78] and *Master Nav. Co.* v. *Great Circle Ship Corp.*[79] In the latter, it was pointed out that:

> ". . . there is no statutory exception to the hearsay rule admitting such affidavits in evidence nor should common law confer any such exception on the basis of trustworthiness or necessity.
>
> . . . Dean McLaughlin rejects the common law view of *Queensboro Leasing, Inc.* v. *Resnick*, supra, relying on the trustworthiness of a process server's affidavit as being guaranteed by his exposure to a negligence action by his employer for a falsehood as held in *Heredia* v. *Contino*, 79 Misc. 2d 222, 360 N.Y.S. 2d 144 (App. Term 9 & 10 Dept. 1973). But this view ignores the realities of sewer service which, as pointed out in *Queensboro Leasing, Inc.* against *Resnick*, supra, is not an isolated practice in this city and has necessitated recent statutory protection against such abuses."[80]

Whether the law has served to reduce the volume of sewer service is impossible to determine. Clearly, the only matters which will come to the attention of the courts of civil jurisdiction will be those in which there has been an execution of some sort, the person understands what is happening, desires to contest or protest and actually goes to a lawyer or governmental agency, a combination of factors which is rare in consumer credit actions."[81]

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[78] 78 Misc. 2d 919, 358 N.Y.S. 2d 939 (Civ. Ct., Queens Co., 1974).

[79] —— Misc. 2d ——, 383 N.Y.S. 2d 826 (Civ. Ct., N.Y. Co., 1976).

[80] *Id.*, at ——, 383 N.Y.S. 2d at 828.

[81] Schrag, *New Court Rule Will Curb "Sewer Service"*, 173 N.Y.L.J. 1 (February 13, 1975).

(iii) Improper Venue Contributes To Default Judgments

Whether or not a debtor is served, an action may be sited in a place distant from his home, rendering the forum inconvenient. The result is to allow a creditor to select the forum to the debtor's disadvantage.

> "The downstate consumer may find defending a suit in Chicago nearly impossible. He must transport himself and his witnesses to Chicago, which may be several hundred miles away, and may have to do so repeatedly if the other party obtains continuances. Sending his hometown lawyer to Chicago to defend a small claim would be too expensive, so the consumer must either represent himself or hire a Chicago lawyer, whom he is unlikely to know even by reputation. Finally, the downstate consumer is likely to be intimidated by—and perhaps distrustful of—the Cook County courts. Faced with these difficulties, even the consumer with a valid defense is likely to default."[83]

Similar to the Illinois statute,[84] which requires that a consumer credit transaction be sued upon in the debtor's home county or where the transaction occurred, the Texas venue requirement is that suit be brought in the defendant's county of residence.[85] However, in Texas, the courts have apparently failed to adequately regulate creditors' practices, thirty-three exceptions having been grafted onto the basic rule, resulting in a large volume of litigation and a continuation of venue abuse.[86] Empirical research has revealed that non-residents of a county were doubly likely to default when sued by one finance company.[87] In Illinois, although at least one court has held that the statute is to be strictly construed (*American Oil* v. *Mason*),[87] the Illinois Supreme Court has not yet changed its traditional view.[88]

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[83] Harper and Farber, *Illinois Venue Law and The Consumer*, 63 ILL. S.B.J. 449 (1975). *See also*, submitted testimony of Givens, *Hearings, December 11, 1972, supra* note 35, at 59; *Due Process Denied, supra* note 48, at 389 & nn. 83, 84.

[84] Ill. Rev. Stat. ch. 110, § 5 (1973).

[85] Vernon's Ann. Civ. Stat. art. 1995 (1964).

[86] Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEX. L. REV. 269, 270 (1973) (hereinafter Sampson).

The situation in New York provides a clear illustration of the enactment of omnibus measures to curtail such abuse and their apparent failure. In 1973, the State required not only that venue be in the consumer's home county,[89] but also directed clerks to reject summonses for filing that were plainly violative.[90] In approving the statute, Governor Rockefeller commented,

> "Under existing law, a creditor may commence a suit against a consumer-debtor in the county in which the creditor has its corporate 'home'. Often, that county may be one which is far distant from the debtor's place of residence or the places where he trades. The commencement of a suit in a place that is highly inconvenient to the debtor has the effect of discouraging and, indeed, preventing many debtors from appearing in the action and asserting what would otherwise constitute a valid defense.
>
> This bill, by requiring that a suit arising out of a consumer credit transaction be commenced in a county convenient to the buyer, will help to insure that the buyer may appear and take full advantage of his 'day in court.' "[91]

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[87] *Id.*, at 278-279.

[87] 133 Ill. App. 2d 259, 273 N.E. 2d 17 (1st Dist., 1971).

[88] *See*, for an example of that view, *People ex. rel. Carpentier* v. *Lange*, 8 Ill. 2d 437, 441, 134 N.E. 2d 266, 267-68 (1956).

[89] N.Y. CPLR § 503(f).

[90] N.Y. CPLR Rules 513 and 305(a).

[91] Memorandum of Approval, L. 1973, c.238 [McKinney's Session Laws of 1973, Vol. 2, P. 2240].

The problem which arises is the lack of any real penalty for violation—the only relief is a change of venue. *Empire Nat. Bank (BankAmericard Div.)* v. *Olori.*[93] Therefore, as in other instances of abuse, only an alert defendant who knows his rights, is desirous of contesting, and goes to an attorney, will take any action.

There was and continues to be no incentive to any creditor to obey the strictures of the law. One commentator has summarized the advantage to the creditor to deliberately not obey.

> "Of course, the creditor does obtain two significant advantages. First, centralization of collection suits in a single county undoubtedly provides a substantial economic saving: a lawyer specializing in collection practice may be hired or retained; lawsuits can be cranked out at a low unit cost by use of form petitions; and by careful docket scheduling one lawyer may appear for a dozen hearings at a time. Second, the prosecution of a suit in a forum far from the defendant's residence greatly increases the likelihood of a default judgment, with a corresponding saving of legal fees.'"[94]

(iv) Procedures To Defend A Civil Action Are Complex And Legal Representation Is Unavailable

The procedures for defending an action, including a collection suit, are set forth in detail in the New York Civil Practice Law and Rules. The time periods in which to answer a complaint depends on the method of service and, when applicable, the date the affidavit of service was filed.[95]

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[93] ___ Misc. 2d ___, 384 N.Y.S. 2d 948 (Sup. Ct., Orange Co., 1976).

[94] Sampson, *supra* note 85, at 275.

[95] N.Y. CPLR § 308 (McKinney Supp. 1975).

The debtor must understand the applicable statute and the formula to compute the time as well as the method of service in order to timely answer the complaint.

In a recent *St. John's Law Review* article on "Abuse of Process," Elizabeth DeFeis concluded, "[c]onsumer defendants, many of whom are poor and have never had any contact with lawyers and courts, cannot and should not be expected to respond properly to confusing and complex forms and procedures which were created for businessmen and sophisticated individuals and the lawyers representing them."[96]

The alternative is for the debtor to retain an attorney. However, "In the usual consumer case, the sum involved may be so small that it would be greatly exceeded by the cost of paying a private attorney to litigate."[97] The larger the debt, the greater incentive for the debtor to seek legal services." This correlation limits a debtor's access to the judicial system by forcing the debtor to absorb the smaller debts even when a defense may exist.

(v) The Seriousness Of The Problem Created By The Large Number Of Default Judgments Is Reflected In The Variety Of Procedures Implemented In The New York City Courts To Reduce The Number

The New York City Court Act Section 401 was amended in 1968 to direct the defendant to make a personal appearance at the courthouse to file an answer. This procedure allows the clerk to assist the defendant with questions concerning the summons and answer, thus reducing the

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[96] *Abuse of Process and Its Impact on the Poor*, 46 ST. JOHN'S L. REV. 1, 23 (1971).

[97] *Staff Report, supra* note 23, at 131, 132.

[97] *Consumers in Trouble, supra* note 2, at 224.

problems which are caused by a lack of understanding of the form on the part of the defendant (although creating an additional inconvenience by requiring the defendant to appear in court).

In 1970, NYCCA Section 401(d) was added to require that summonses served in an action arising from a consumer credit transaction be printed legibly in both Spanish and English. The purpose of the amendment was to help reduce the problems encountered by Spanish speaking people when confronted with legal papers written in a language they do not understand.[98]

In 1973, 22 NYCRR Section 2900.2 was amended to require the following notice to be attached to a summons for an action arising out of a consumer credit transaction. The notice must be printed in not less than 12 point upper case type at the top of the summons:

Important!! You Are Being Sued!!

THIS IS A COURT PAPER—A SUMMONS

Don't throw it away! Talk to a lawyer right away!! Part of your pay can be taken from you (garnisheed). If you do not bring this to court, or see a lawyer, your property can be taken and your credit rating can be hurt!! You may have to pay other costs too!! If you can't pay for your own lawyer, bring these papers to this court right away. The clerk (personal appearance) will help you!!

The notice is also printed in Spanish, whether or not the complaint is included, and is also attached to a notice of motion for summary judgment.

Philip Schrag, professor at Columbia Law School, writing in the New York Law Journal said, "the caveat

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[98] Memorandum on Approving L. 1970, c. 302 (May 1, 1970) [McKinney's 1970 Session Laws, Vol. 2 at 3094].

has helped to give meaningful warning to those defendants who have been served with civil court process," and "has been a laudable contribution to the dispensation of justice in the Civil Court."[99]

Finally, the Rules of Practice in the Civil Court of NYC was recently amended to establish a very stringent procedure for entering default judgments in consumer credit actions commenced after March 1, 1975.[100] Seven days prior to the entry of the default judgment, the defendant must be mailed a notice alerting the debtor that the plaintiff intends to apply for the entry of a default judgment. The return address on the envelope is the street address of the Civil Court. If the envelope is returned by the Post Office to the Clerk because it could not be delivered for any reason except refusal or unclaimed by the addressee, no default judgment can be entered.

These new procedural requirements begin to deal with the broad problems of the large percentage of judgments by default. These severe modifications in procedure dramatize both the seriousness of the problem and the obvious recognition of the problem by the courts in New York City.

It should be noted that the reforms adopted for New York City have not been followed in other parts of the state, including Dutchess County.

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[99] Schrag, *New Court Rule Will Curb "Sewer Service"*, 173 N.Y.L.J. 1 (February 13, 1975).

[100] 22 NYCRR § 2900.18.

III. The Use Of Civil Contempt In Supplementary Proceedings Is An Integral Part Of The Collection Process Beginning With Summons And Complaint And Continuing Through Default Judgment And Resulting In Some Instances In Imprisonment For Debt

The supplementary proceedings stage in a creditor's action against a debtor includes use of devices to obtain information about the debtor's assets and devices to apply money or property to the satisfaction of the judgment. It is at this stage that the specific issues pertinent in this case arise. These procedures must be seen, however, as a segment of the entire process beginning with the summons and complaint and perhaps earlier with pre-suit extra legal attempts to collect or with the extension of credit itself. For example, where a default judgment has been obtained against a debtor who has failed to answer because he could not understand the summons and complaint,[101] it is likely that similar difficulties will arise during the supplementary proceedings stage. The debtor who could not understand the papers served prior to judgment may be expected to have problems understanding papers served in supplementary proceedings.[102]

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[101] For a discussion of debtors inability to comprehend legal papers served upon them see p. 21 *supra*.

[102] The inability of debtors to understand papers served subsequent to judgment is demonstrated by the number of debtors who repeatedly undergo default judgment and commitment, who are willing to cooperate with creditors, but who nonetheless are unable to understand why they were fined or how they could prevent it. Richard Alderman in *Imprisonment for Debt, supra* note 49, found that although 47.5% of the subjects studied previously had had a judgment entered against them, and approximately 30% of these previously had had a commitment order issued against them, none of these debtors understood why they were fined or how they could prevent it. *Id.* at 1235. Of 467

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A. The Judgment Creditor Has A Number Of Devices For Reaching The Income Or Other Property Of A Judgment Debtor. Some Of These Require The Use Of Supplementary Proceedings Which May Include The Unconstitutional Contempt Process Challenged In This Case

There are a variety of devices in New York for applying the debtor's income or other property to the satisfaction of a judgment.

Among the methods for reaching a judgment debtor's income are the income execution[103] (garnishment) and the installment payment order.[104] A creditor may also obtain

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cases in the study, 31% were fined more than once to compel disclosure. In 40 cases, the debtor was held in contempt 3 or more times with one debtor suffering contempt 7 times. *Id.* at 1236. Alderman poses the question why debtors would undergo repeated fines, suffer added court costs, and the threat of jail, despite a willingness on the part of debtors to cooperate with creditors. One answer, that may be inferred, is that debtors do not understand either the meaning or the legal significance of the papers served upon them.

[103] N.Y. CPLR Section 5231.

[104] N.Y. CPLR Section 5226.

The payment of a fine in installments must be distinguished from an installment order under N.Y. CPLR § 5226 (McKinney 1963). Orders to pay support or alimony are analogous to installment payment orders. While none of the debtors in this case are subject to an installment payment order, its use does present analogous problems of imprisonment for debt through the use of civil contempt and a number of cases cited in the Attorney General's brief arose from the use of installment payment orders. See Brief for Appellants, at 23, *Vail* v. *Quinlan*, 406 F. Supp. 951 (1976) *citing Sure Fire Fuel Corp.* v. *Martinez*, 75 Misc. 2d 714, 348 N.Y.S. (Civil Ct., N.Y. Co., 1973); *Uni-Serv Corp.* v. *Linker*, 62 Misc. 2d 861, 311 N.Y.S. 2d 726 (Civil Ct., N.Y. Co., 1970).

Alderman's study revealed that in a slight majority of the cases involving installment payment orders, "the subject was totally unaware of the existence of the order. In two-thirds of the remaining cases the subject knew that an order existed but

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the judgment debtor's property, CPLR Art. 52, among other ways, by the usual process of levy and execution, or by applying for a writ of replevin, CPLR Art. 71, or order of attachment, CPLR Art. 62.

However, the creditor's first task after judgment is to locate the debtor's assets to be used to satisfy the judgment. In a number of instances, the judgment creditor "will be aware of the location of assets of the judgment debtor." H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 428 (5th ed. 1976) (hereinafter NEW YORK PRACTICE UNDER THE CPLR). A creditor will often have a financial statement from the debtor listing a place of employment. In these circumstances the creditor can proceed directly from judgment to collection by levy and execution or garnishment. If the debtor has no assets or no income subject to garnishment or the creditor is not aware of these, the creditor may decide to use one of two available procedures for disclosure of assets.

A creditor's attorney can issue a subpoena requiring the attendance of the debtor for an examination concerning the disclosure of assets at the courthouse or some other location specified by the creditor's attorney.[105] "Leave of the court is not required for the issuance and service of the

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was unable to convince the interviewer that he understood what one was." *Imprisonment for Debt, supra* note 49 at 1237.

Failure to comply with an order directing the judgment debtor to make installment payments may be punished as contempt of court pursuant to CPLR § 5251 which states:

> "[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court." N.Y. CPLR § 5251 (McKinney Supp. 1975-1976).

[105] N.Y. CPLR Section 5223 and Section 5224(a)(1).

subpoena." NEW YORK PRACTICE UNDER THE CPLR at 429. But it must be served in the same manner as a summons. CPLR Section 2303.

In the alternative, an information subpoena can be issued requiring the judgment debtor to provide sworn answers under oath to a list of written questions and to return the answers by mail to the creditor's attorney within seven days. CPLR Rule 5224(a)(3). "An information subpoena may be served by registered or certified mail, return receipt requested." NEW YORK PRACTICE UNDER THE CPLR at 430.

The enforcement of the information subpoena and the subpoena for examination concerning assets depends on the challenged contempt procedures. CPLR Section 5251. However, use of either subpoena may lead directly to the collection of the judgment rather than the disclosure of assets.[106] This would occur where the debtor fails to respond to either subpoena and ultimately is fined by the court for contempt.[107] The fine which is payable in large

[106] The use of post judgment disclosure devices has been described by David Caplovitz in CONSUMERS IN TROUBLE, *supra* note 2, and Richard Alderman in *Imprisonment for Debt, supra* note 49.

[107] For discussion of creditors use of the contempt process to collect judgments see generally *Imprisonment for Debt, supra* note 49. Therein Alderman contends that the New York disclosure laws hav failed to meet their objective of disclosing debtor assets to creditors. Rather, the information subpoena and contempt process are utilized by creditors as a device to collect payment from often time unwitting debtors. Alderman states:

> "[t]he results of the study suggest a pragmatic creditor strategy: utilizing the contempt power, the creditor can be assured that the judgment actually will be paid, through court imposed fines enforced under the threat of imprisonment. By taking advantage of default judgments and *ex parte* contempt proceedings, the creditor is able to bypass the prescribed enforcement techniques (and their debtor-protection

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part to the creditor, if accompanied at some stage by a commitment order may be collected by a deputy sheriff under threat of imprisonment. In some instances, the debtor may actually be imprisoned[108] and then may obtain

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> provisions) and proceed directly to an action against the person of the debtor. For the debtor the choice is to pay the fine for contempt (which the court pays over to the creditor)—or be jailed." *Id.*

Debtors are repeatedly subjected to contempt following failure to respond to information subpoenas. For discussion of repeat contemnors see note 2 *supra*. Creditor preference for and reliance upon the information subpoena and contempt process to collect debts rather than to expose debtor assets is demonstrated in *Uni-Serv Corp.* v. *Batyr*, 62 Misc. 2d 860, 311 N.Y.S. 2d 456 (Civ. Ct., N.Y. Co., 1970). There the debtor appeared in court in response to creditor's subpoena, paid money on the account and signed a stipulation adjourning the examination one month. The court noted 18 similar stipulations entered into by the parties before an order to show cause why she should not be held in contempt and an attachment order was requested. The court refused to issue the order as it "would be the grossest abuse of discretion for me, faced with this pattern of harassment . . ., to issue this attachment. *Id.* at 861. The court further stated:

> "[i]f plaintiff wished to examine the defendant, its attorneys should have done so when she arrived in court in response to the subpoena. If they wished her 'contempt' adjudicated, they should have done so when, it seems, she came to court in response to the order to show cause." *Id.*

[108] Imprisonment for debt is not uncommon. Prior to 1970 and the decision of *Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970), declaring jail sentences for Maine debtors pursuant to the Maine statute violative of their rights, 200 debtors from two Maine counties had spent 1754 days in prison during a two year period because they were held in contempt of court. *Consumers in Trouble, supra* note 2 at 226 n. 1. Professor Caplovitz, in his empirical study of debt collection practice, has also noted similarities between the New York procedure and the former law in Maine. *Id.* Following *Desmond* v. *Hachey*, Maine has reformed its post judgment debt collection procedures to eliminate the obnoxious practice of imprisonment of debtors without a prior hearing. For discussion of the Maine law reform see Comment, *Post-judgment Procedures for Collection of Small Debts: The Maine Solution*, 25 MAINE L. REV. 43 (1973).

his release by payment of the fine provided that he has or can by some means find the funds to do so.[109] (See A.18a, A.28a, A.66a).

B. The New York Civil Contempt Practice Varies Depending On The Court And The Part Of The State And May Result In Imprionment For Debt

The use of civil contempt to enforce orders directing the payment of money or subpoenas requiring the disclosure of assets is then an integral part of the collection proc-

[109] Compare *Tate* v. *Short*, 401 U.S. 395 (1971), in which a Texas statute (and ordinance of the City of Houston) providing for imprisonment of persons unable to pay a fine for a period calculated at $5 a day was held to violate the equal protection clause.

When considering the "sinister implications" of post judgment disclosure devices Professor Caplovitz states:

> "[t]he tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison. It is not known whether any debtor in our sample went to jail because of his failure to appear at a supplementary proceeding, but this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences have occurred in his area. One victory for the OEO's legal services program was won in Maine in the summer of 1970, when legal services attorneys successfully argued before a three-judge federal court panel that such jail sentences were unconstitutional." CONSUMERS IN TROUBLE, *supra* note 2 at 226.

The use of such procedures is not infrequent.

Professor Alderman's study in Onondaga County, New York, revealed that in six sessions of the Onondaga County Court, Motion Term 455 consumer lawsuits were dealt with resulting in 296 contempt citations, 47 payment orders, 57 adjournments, and 55 discontinuances. *Imprisonment for Debt, supra* note 49 at 1230. Since Motion Term of Onondaga County Court is conducted on three consecutive Mondays of each month, it may be inferred that the use of post judgment information subpoenas followed by contempt and imprisonment is extensive.

ess.[110] The use of contempt results in imprisonment for debt or the threat of imprisonment for debt in a variety of circumstances. A creditor who has obtained an installment payment order may enforce it by civil contempt when the

[110] Two practice manuals describe the practice in different forms. These are *Sherwin, supra* note 14 and *Needham and Pollock, supra note* 2. *Needham and Pollock* indicate that:

1. contempt is used to punish failure to answer an information subpoena;
2. "[u]nder the scheme of the CPLR persons can be punished for contempt even though they were not served personally";
3. the proceeding for contempt "will be rendered academic if the judgment debtor then appears for examination";
4. "[e]xperience has shown that [such schooled?] judgment debtors may make the mistake of procrastinating so long that they may find themselves actually subject to a contempt order and the imposition of a fine. Failure to pay such fine will result in the imprisonment of the judgment debtor. Additionally, the fine cannot be discharged in any bankruptcy proceeding filed by the judgment debtor"; and
5. "[v]igorous pursuit of the contempt proceedings by the attorney for a judgment creditor is an essential principle in the successful enforcement of a judgment." NEEDHAM AND POLLOCK at 188-189.

The Needham and Pollock description shows that (a) contempt is used and indeed vigorously pursued as a means of collecting debts; (b) that a debtor who appears at a contempt hearing will not normally be punished—and hence those punished are those not at the hearing; and (c) that there is no personal service of the debtor before he is punished for contempt.

The Sherwin manual describes procedures similar to those used by the New York City Civil Court. Under this practice a warrant of attachment is used to bring a debtor before the court rather than imprisonment subsequent to an *ex parte* commitment order. There is nevertheless no requirement of personal service, a genuine possibility of imprisonment, and an opportunity for the creditor to obtain payment of the debt rather than information where the debtor has failed to answer an information subpoena. *Sherwin, supra* note 14 at 59-63.

New York City cases which follow the practice described by Sherwin include *Sure Fire Fuel Corp.* v. *Martinez, supra* note 6-4; *Uni-Serv Corp.* v. *Batyr, supra* note 104; and *Diamond and Frazer Iron Works, Inc.* v. *DiTullio,* 157 Misc. 800, 284 N.Y.S. 658 (City Ct. N.Y., Bronx Co., 1935).

debtor refuses to pay or has skipped payments.[111] A creditor's attorney who has issued an information subpoena or a subpoena directing a judgment debtor to appear for examination concerning assets may use the contempt procedure to compel disclosure or to obtain payment. The contempt process is also used in state supreme court or family court by spouses seeking to enforce orders directing payment of support or alimony.

New York is a large state divided into four Judicial Departments, 11 Judicial Districts, and 57 counties outside the City of New York. The practice concerning the use of contempt for these purposes varies depending upon the part of the state[112] and the rules governing the particular court.[113]

[111] Professor Alderman describes the New York practice concerning installment payment orders as the following:

> "Unlike the information subpoena, the issuance of the installment payment order is directed by the court. In issuing the order the court is mandated to consider 'the reasonable needs of the judgment debtor and his dependents.' Generally this information is obtained at a show cause hearing, and, as in the case of contempt, the debtor's failure to appear will constitute an acceptance of the creditor's terms. Often the amount of the installment payment order will be based on an alleged agreement by the debtor to pay a certain amount. This 'agreement' is incorporated into the court order *ex parte*. Once the order is issue the debtor is legally bound to pay the stated amount to the creditor, and, in the event that he fails to make the payments, he can be required to show cause why he should not be found in contempt." *Imprisonment for Debt, supra* note 49 at 1237.

New York cases stemming from installment payment orders include *Sure Fire Fuel Corp.* v. *Martinez, supra* note 104; and *Uni-Serv Corp.* v. *Batyr,* and *Linker, supra* note 104.

[112] The use of these procedures primarily by domestic relations and collection attorneys in different Judicial Departments and in particular county courts or supreme courts in various counties makes reform of the process extremely difficult. A reform in New York City will not produce a change in Onondaga County.

[113] Reform is also made difficult by the custom of some collection attorneys to abandon difficult actions. Note that many of the

(footnote continued on following page)

(i) In Domestic Relations Matters, The Contempt Statutes Governing Family Court Practice Include Steps Which Are Constitutionally Required, But Those Governing State Supreme Court Do Not

(a) *Family Court.* When a spouse has failed to obey an order of the Family Court directing the payment of support, the court may "issue a warrant directing that the respondent be arrested and brought before the court." N.Y. FAMILY COURT ACT Section 453 (McKinney 1975) (hereinafter, FAMILY COURT ACT). The subsequent procedure is described in FAMILY COURT ACT Section 454:

"If a respondent is *brought before the court* for failure to obey any lawful order issued under this article and if, after hearing, the court is satisfied by competent proof that the respondent has failed to obey any such order, the court may

(a) commit the respondent to jail for a term not to exceed six months, if the failure was willful. . . ." FAMILY COURT ACT Section 454 (emphasis supplied).

The court may suspend the order of commitment if satisfied that respondent will obey the orders of the court. FAMILY COURT ACT Section 455. A spouse brought before the court pursuant to a warrant must be advised of his right to counsel. FAMILY COURT ACT Section 433. Where the spouse is indigent, counsel will be assigned under the authority of FAMILY COURT ACT Section 262. *See, Rudd* v. *Rudd,* 45 A.D. 2d 22, 356 N.Y.S.2d 136 (4th Dept. 1974).

The debtors' problems in the case before the Court did not arise in Family Court. The Family Court procedures adhere substantially to the requirements of due process of law which appellees and the Consumer Protection Board contend were mandated constitutionally and not followed in the state court procedures which led to this case.

(b) *State Supreme Court.* The state supreme court which in New York is the lowest trial court of general jurisdiction may issue an order directing the payment of support in a domestic relations matter. The failure to obey such an order is punishable as contempt. N.Y. DOMESTIC RELATIONS LAW, Section 245 (McKinney Supp. 1975) (hereinafter, DOMESTIC RELATIONS LAW). The supreme court is not governed by the FAMILY COURT ACT. The general contempt procedures which appellees and the Consumer Protection Board are challenging in this case would be followed in a supreme court domestic relations case. Those procedures as applied in such a case were declared unconstitutional by the Supreme Court for Kings County in *Darbonne* v. *Darbonne,* 85 Misc.2d 267, 379 N.Y.S.2d 350 (1976). The case was decided after and re-

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creditors in this case did not appear in the United States District Court and are not represented before this Court. (J.S. 21a, A 156a, A 160a, A 162a, A 62a, A 82a). Reform in such circumstances may be possible only by a class action seeking declaratory judgment.

The custom of abandoning difficult cases may be influenced by the need for volume and efficiency in a collection practice. See A. RUBIN, FUNDAMENTALS OF THE COMMERCIAL PRACTICE 72-73 (1965) where it is stated:

> "The commercial attorney will soon find out that his success or failure depends to a large extent on his efficiency in handling well without vastly increasing his overhead . . . He must continually strive to improve his systems and techniques to give first quality service without undue cost. If he finds he is spending most of his day answering inquiries, his disenchantment is probably of his own making." *Id.;*

12 AM JUR *Trials* 197-8 where it is stated:

> "[s]uccesful collection attorneys streamline the collection procedure and do not spend much time and effort until there is some reasonable hope of success . . . In the absence of a policy reason, if no reasonable hope of making some recovery exists, the matter should be returned to the creditor-client . . . Because it is essential that counsel's time not be consumed in performing mechanical operations, a capable secretary can be taught to handle the routine administrative work. Volume is the secret to financial success in this type of practice, and a well trained secretary is the best way to handle volume." *Id.*

See also Stamm, *A Sweeter Road to Profits in the Commercial Practice,* 70 COM. L. J. 199, 199 (1965).

lied upon *Vail* v. *Quinlan*. In *Darbonne* the defendant did not appear in response to the order to show cause. The court describes the procedure it would have followed in the absence of *Vail* v. *Quinlan*:

> "There being no opposition, the court heretofore would ordinarily have granted the motion and ordered that the defendant be punished for contempt with leave to purge. Included in such an order would be a proviso that if the defendant did not comply with the purging terms therein, then without further notice, an order of commitment (i.e., imprisonment) may issue to the sheriff. 85 Misc.2d at 268, 379 N.Y.S. 2d at 351."[114]

The court remarked that "This entire procedure is authorized by DOMESTIC RELATIONS LAW, Section 245 and, as provided for therein, enforced by Article 19 of the JUDICIARY LAW." *Id.* Prior to *Vail* v. *Quinlan* in a case such as *Darbonne* in Supreme Court for Kings County the defendant would not have been brought before the court nor would he, even though indigent,[115] have been assigned counsel.

(ii) The Contempt Practice In The Civil Court For The City Of New York Under Article 19 Of The Judiciary Law Is Unconstitutional But Includes A Significant Step Constitutionally Required But Missing In the Contempt Practices Relevant In This Case

Article 19 of the JUDICIARY LAW which governs contempt proceedings describes two alternate procedures in JUDICIARY LAW Section 757. Under subsection 1 the court may

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[114] The procedure described and rejected in *Darbonne* is essentially that followed in appellee Rabasco's domestic relations case.

[115] For an example of a case out of Kings County where there is no indigent see *Walker* v. *Walker*, 51 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976).

issue an order directing the accused to show cause why he should not be punished for contempt. Under subsection 2 the court may, in the alternative, issue a warrant of attachment directed to the sheriff commanding him to arrest the accused and bring him before the court to answer for the alleged offense.[116]

A series of cases in the Civil Court for the City of New York has addressed the procedure to be employed when a creditor is seeking to punish a judgment debtor for contempt because he has failed to pay installments under an installment payment order.[117] In *Diamond and Frazer Iron Works, Inc.* v. *DiTullio*, 157 Misc. 800, 284 N.Y.S. 658 (City Ct. N.Y., Bronx Co., 1935), the court chose to employ the optional procedure found in JUDICIARY LAW

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[116] Sec. 757. *Order to show cause, or warrant to attach offender.*

> "The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either
>
> 1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or
>
> 2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.
>
> Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard."

[117] For discussion of contempt as used against debtors failing to pay under payment installment orders see note 104 *supra*.

Section 757(2) and explained:

> "I do not think, however, that such orders should be made on the default of the judgment debtor. If he does not appear on the motion, he should be brought before the court by attachment, so that the court may determine whether he has any excuse for failure to obey the order." 157 Misc. at 801, 284 N.Y.S. at 659.

In *Sure Fire Fuel Corp.* v. *Martinez,* 75 Misc.2d 714, 348 N.Y.S. 2d 502 (Civ. Ct., N.Y. Co. 1973) Judge Gabel refused to punish a judgment debtor for contempt in his absence and directed the issuance of a bailable attachment under JUDICIARY LAW Section 757(2). The court explained:

> "From the very nature of the severity of the punishment, however this powerful weapon should not be deployed on such a free and easy basis that contempt is determined by default or on a *pro forma* affidavit . . .
>
> The fact that the judgment debtor has failed to comply with the order does not of itself render the defendant guilty of contumacious conduct calculated to defeat, impair, impede and prejudice the rights and remedies of the plaintiff, as stated in the moving papers. In fact, a statement to that effect by plaintiff's attorney is unsupported by evidence of any kind. 'If a debtor is directed to pay installments out of his income and he has no income during certain periods he does not disobey the mandate by failing to make payments on such occasions and cannot be punished for contempt . . .' " 75 Misc.2d at 715-716, 348 N.Y.S.2d at 505-506.[118]

[118] The "better practice" and its rationale is described in *Uni-Serv Corp.* v. *Linker, supra,* note 104 as follows:

> "Contempt should not . . . be determined by default or on a *pro forma* affidavit . . . It is the better procedure to bring

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In *Uni-Serv Corporation* v. *Batyr,* 62 Misc.2d 860, 311 N.Y.S.2d 456 (Civ. Ct., N.Y. Co., 1970) the court recognized the practice in New York City Civil Court of issuing a bailable attachment under JUDICIARY LAW Section 757(2) before punishing a judgment debtor for contempt. However, the court in the circumstances refused to issue the writ of attachment."[119] The court recited a number of appearances by the debtor and stipulations of adjournment and explained:

> "[t]he court records indicate that the debtor did not appear on that date; and I am now asked to sign an attachment order directing the Sheriff to produce Mrs. Batyr by virtue of the 'contempt' (JUDICIARY LAW Section 757).
>
> This I decline to do. The issuance of such an order is discretionary (JUDICIARY LAW Section 757); and it

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> the debtor 'before the court by attachment, so that the court may be able to determine whether he has any excuse for failure to obey the order' (*Diamond & Fraser Iron Works* v. *DiTullio,* 157 Misc. 800, 801). The plaintiff's attorney's conclusory statement contained in his affidavit in support of this motion that (the defendant is in a position to make regular payments) is hardly a substitute for proof. Contempt has not been proved . . .
>
> It should be observed that the plaintiff is not without remedy. A new subpoena may be served and the debtor's assets or income ascertained (CPLR 5223; 5224, subds. [a] and [f]). Generally, if this or any other debtor ignores a subpoena, let him be brought before the court and have the alleged contempt adjudicated. A fine may be imposed in reduction of the obligation or otherwise (Judiciary Law, § 773) and the debtor, on pain of further punishment, may be directed to submit to an examination—which is all the plaintiff was entitled to in the first instance. If an installment payment order is then warranted, an appropriate motion may be made and proper proof taken. The safeguards of the statute are not to be eroded by stipulations designed to use the contempt power for the collection of judgments." 62 Misc. 2d 865-866, 348 N.Y.S.2d at 730-731.

[119] For discussion of contempt as used against debtors failing to pay under installment payment orders see note 104 *supra.*

would be the grossest abuse of discretion for me, faced with this pattern of harassment . . . to issue this attachment." 62 Misc.2d at 861, 311 N.Y.S.2d at 457.[120]

The Civil Court for the City of New York in the cases cited has required as a matter of practice one step which was not employed in the Dutchess County procedures challenged in this case and which the appellees and the Consumer Protection Board believe is constitutionally necessary; namely, the bringing of the accused before the court before committing him to jail.

The Civil Court did not reach this conclusion by statutory interpretation or by declaring the statute unconstitutional. JUDICIARY LAW Section 757 offers the court a choice between the order to show cause procedure in Section 757(1) and the warrant of attachment procedure in Section 757(2). Indeed as the Attorney General points out on page 23 of his brief, the court may first employ Section 757(1) and then Section 757(2). The Civil Court as a matter of the "better practice" (*Sure Fire Fuel Corp.* v. *Martinez, supra* note 104 at 506) has followed the procedure recommended by the Attorney General in his brief. Under New York law, the court could have chosen not to do this. Unlike the FAMILY COURT ACT, JUDICIARY LAW Section 757 offers the courts a choice of procedure. The procedure followed in Dutchess County in the challenged cases is unambiguously permitted by the statute. The District Court in *Vail* v. *Quinlan* correctly concluded that the statute is unambiguous.

The procedure in the New York City Civil Court is not unobjectionable on constitutional grounds. The appellees

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[120] *Uni-Serv Corp.* v. *Batyr, supra* note 104, deals with an information subpoena to appear, testify and produce documentary evidence. *Uni-Serv Corp.* v. *Linker, supra* note 104, deals with an installment payment order.

and the Consumer Protection Board contend that the judgment debtor should be given clear notice of potential imprisonment and if indigent should be assigned counsel. These elements are missing in the City Court procedure[121] and in the cases just discussed.

(iii) The Contempt Practice Challenged In This Case And Used In Other Parts Of The State Lacks Elements Which Are Constitutionally Required

Richard Alderman's *Imprisonment for Debt, The Contempt Power and The Effectiveness of Notice Provisions in The State of New York*, 24 SYRACUSE L. REV. 1217 (1973) contains an empirical study of the use of information subpoenas[122] and installment payment orders followed by

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[121] The practice portrayed by Sherwin in his handbook for New York collection attorneys, *supra* note 14 at 59-63 substantially resembles the City Court practice. Sherwin contemplates the use of the warrant of attachment to bring the debtor before the court. *Id.* 59. Despite this practice, there is nevertheless no requirement of personal service *Id.*, apparently a genuine possibility of imprisonment *Id.* and an opportunity for the creditor to obtain payment of the debt—possibly with the help of the bailable attachment—rather than information where the debtor has failed to answer an information subpoena. *Id.* The practice as outlined by Sherwin does not include assignment of counsel. The importance of the procedure is emphasized by the substantial number of forms provided by Sherwin which are relevant to this practice—approximately a quarter of the whole number of forms.

[122] For an illustration of use of the subpoena to appear to be examined for assets as a threat in the extra-legal pre-suit collection process see P. SCHRAG, CASES AND MATERIALS ON CONSUMER PROTECTION 1022 (2d Ed. reprint from Cooper, Berger, Dodyk, Paulsen, Schrag and Sovern, Cases and Materials on Law, and Poverty) where affidavits used in *Grant* v. *Compact Electra Corp.*, Index No. 49060/70 (S. Ct. N.Y. Co., N.Y.) are presented. Exhibit A-3 to Affidavit of Roy Morrison contains excerpts from pre-suit collection documents which read in part as follows:

"If you are sued on a debt and the court gives judgment against you, you are in serious trouble . . .

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fines and imprisonment for contempt during the post-judgment collection process in New York's Onondaga County.

The contempt procedure described by Alderman is based upon JUDICIARY LAW Section 757(1) under which a court may issue an order directing the accused to show cause why he should not be punished for contempt. 24 SYRACUSE L. REV. 1217, *supra* at 1222. Alderman states:

> ". . . the practice generally followed in the case of nondisclosure is the issuance of a show cause order and a subsequent hearing to determine the guilt or innocence of the alleged contemnor.
>
> In the event that the judgment debtor fails to appear at the show cause hearing he will be adjudged in contempt in absentia, the burden of proof having shifted to the debtor to show cause why he should not be held in contempt. After return of the show cause order and a determination that the judgment debtor is in contempt, the debtor may be fined an amount sufficient to indemnify the aggrieved creditor, or to pay him an amount not exceeding costs plus $250. Immediately thereafter a commitment order will issue, directing that the judgment debtor stand committed to the local jail until such time as the fine is paid. The judgment debtor may then remain incarcerated, without the assignment of counsel or judicial review, for up to 90 days. The fine, when paid, is remitted directly by the court to the judgment creditor and is applied to the debt." *Id.* at 1223-1224 (footnotes omitted).

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> An officer of the court . . . may be instructed to bring you and your family into court and force you and them to tell under oath what property you own. This will be expensive and embarrassing to you.

Under the procedure as described by Alderman, the debtor may be imprisoned and remain in prison for 90 days without ever being physically present before the court.[123] Debtors so imprisoned are not informed of their right to counsel and indigent debtors accused of contempt are not assigned counsel.

Alderman describes the flow of cases in Onondaga County Court as follows:

> [f]or the two-month period under consideration a total of 467 cases appeared on the calendar of Onondaga County Court, Motion Term, all but 12 of which

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[123] New York's Installment Payment order is also enforceable by the contempt process. Alderman states:

> "In parallel fashion, New York's installment payment order is also enforceable by the contempt power. The installment payment order, originally designed to replace the remedy of income execution (wage garnishment), is a court order directing the judgment debtor to make periodic payments to the judgment creditor. The amount of the payment is to be determined by the court after notice is given to the judgment debtor and a hearing is held. In deciding upon the amount of the payments the court is directed by law to consider the reasonable needs of the judgment debtor and his dependents. Like contempt proceedings, the hearing for the installment payment order is upon an order to show cause. Field observations in Onondaga County disclosed that when the judgment debtor fails to appear, an installment payment order generally issues in the amount requested by the judgment creditor. If subsequent to the issuance of an installment payment order the judgment debtor fails to make payments to the creditor as directed, the judgment creditor may apply to the court to have the judgment debtor held in contempt. The procedures followed in arriving at a finding of contempt will be the same as those discussed above with regard to disclosure. The amount of the fine, however, will be limited to the amount of arrearage that the judgment debtor has incurred on the installment payment order. The one factor common to the employment of the contempt power in both the case of an installment payment order and an information subpoena is that the debtor's failure to appear at the show cause hearing results automatically in a finding of contempt, and a fine and commitment order will issue accordingly." *Imprisonment for Debt, supra* note 106 at 1225-1226.

were concerned with contempt proceedings and the enforcement of money judgments. A profile of the study population (see Table 1 below) reveals that 296 of the cases (63.4 percent) were instituted to enforce, through the contempt power, debtor compliance with information subpoenas. In 93 of these disclosure cases the debtor was being fined for a repetitive failure to comply with the judgment creditor's requests for disclosure. Forty-seven cases (10.6 percent of the total) were instituted either to obtain or to enforce an installment payment order. In only 32 cases (6.9 percent) did the judgment debtor appear at the show cause hearing. In all cases in which the judment debtor appeared the court granted either an adjournment or discontinuance." 24 SYRACUSE L. REV. at 1229 (footnotes omitted).[124]

The contempt procedures employed in Dutchess County led to the case before this Court. Appellees Vail, Ward, McNair, Hurry, Nameth, Humes, and Harvard were fined for contempt of court for failure to appear in response to subpoenas issued by attorneys for their creditors.[125] The

[124] Alderman conducted a follow-up study in October of 1972 designed to insure the validity of his findings. Alderman concluded that:

"The pattern observed in the initial two month study remained stable.

From the original study population of 467 a smaller working sample of 108 cases was selected. This sample closely correlated with the total population. In 70 of the cases (64.8 percent) the judgment debtor was accused of failing to comply with the judgment creditor's requests for disclosure. Of these, approximately one quarter were for repetitive failures. Twenty-five cases (23.1 percent of the smaller working sample) involved installment payment orders." *Imprisonment for Debt, supra* note 106 at 1229.

[125] Compare *La Prease* v. *Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970) wherein a replevin statute which permitted subpoenas deemed orders of the court to be issued by attorneys for their creditors was struck down by the court as violative of due process and the 4th Amendment.

subpoenas were issued following default judgments to compel disclosure of assets. The creditors instituted civil contempt proceedings using the order to show cause procedure authorized by JUDICIARY LAW Section 757(1). The orders directed each appellee to show cause "why he should not be punished as for contempt for violation of and non-compliance with the said subpoena." The orders did not warn the debtor concerning potential fine or imprisonment. The appellees who did not appear in response to the order to show cause were fined in their absence. Upon failure to pay the fine, the court issued an *ex parte* commitment order. The court did not at this stage employ the warrant of attachment procedure made available by JUDICIARY LAW Section 757(2). Appellees Vail, McNair, Nameth, Humes and Harvard were arrested and imprisoned. Appellees Nameth and Humes were arrested and imprisoned on February 10, 1975, although a Temporary Restraining Order had been issued on January 8, 1975, to prevent their arrest. They were released when counsel called the restraining order to the attention of the state court. The other appellees were released upon payment of the fines.

The procedure followed in these cases is substantially the same as that described by Alderman. The court followed the procedure authorized by JUDICIARY LAW Section 757(1). The appellees were committed to jail without ever being physically present before the court. Counsel was not assigned although appellees Vail, Ward, Humes, and Harvard as a matter of public record were recipients of various public assistance grants and therefore presumptively indigent.

Appellee Rabasco was subjected to a civil contempt procedure instituted by his wife, Gladys Rabasco, to enforce a support order. The procedure followed in his case was substantially similar to that declared unconstitutional

in *Darbonne* v. *Darbonne, supra,*[126] and before that followed in Kings County Supreme Court. Appellee Rabasco, however, did appear at the show cause hearing and requested assignment of counsel on the ground that he did not have sufficient funds to retain a lawyer. His request was denied.

C. Many Factors Leading To Default Judgments Also Lead To Imprisonment During The Supplementary Proceedings Phase

A collection attorney in New York may combine one of the contempt procedures just outlined with use of such collection and information gathering devices as the installment payment order and the information subpoena or the subpoena to appear for examination as to assets. It is possible in New York to use this combination as a means for collecting a judgment under the threat of imprisonment or by actually imprisoning the debtor until the judgment is paid.[127]

A collection attorney's ability to use this combination efficiently[128] to achieve his goal of collecting judgments is

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[126] For discussion of *Darbonne* v. *Darbonne,* see footnote 19 and accompanying text, *supra.*

[127] See SHERWIN, *supra* note 14 at 59-63; NEEDHAM AND POLLOCK, *supra* note 2 at 188, 89; *Imprisonment for Debt, supra* note 6-16 at 1224; See also Donnelly and Donnelly, *1974 Annual Survey of N.Y. Commercial Law,* 26 SYRACUSE L. REV. 233, 273-4 (1975); Donnelly and Donnelly, *1972 Annual Survey of N.Y. Commercial Law,* 24 SYRACUSE L. REV. 325, 350 (1973); Donnelly and Donnelly, *1971 Annual Survey of N.Y. Commercial Law,* 23 SYRACUSE L. REV. 373, 396-97 (1972).

[128] In regard to the collection attorneys' need for efficiency see A. RUBIN, FUNDAMENTALS OF THE COMMERCIAL PRACTICE, 72-3 (1965); 12 AM. JUR. TRIALS, 1973; Stamm, *A Sweeter Road to Profits in the Commercial Practice,* 70 *Com. L. J.* 199, 199 (1965) and the quotations from these works, *supra* note 113.

Rubin notes:

"Fundamentally, the collection process is an attempt by the commercial attorney to find the particular debtor's 'threshold

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enhanced by the same factors which lead to default judgments in consumer credit actions:

(i) Factors related to the papers served

Among the factors common to default judgments in consumer credit actions and to the use of contempt as a means for collecting a judgment are difficulties with the service of process or papers and failure by the debtor to understand the papers served because of inability to read, inability to read English,[129] or lack of comprehension of legal

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of pain' in order to force the debtor to come forward voluntarily to pay the claim . . .

Some jurisdictions permit an examination of the debtor under oath in aid of execution. Such an examination may be extremely helpful and frequently of itself may touch a 'threshold of pain.'" A. RUBIN, FUNDAMENTALS OF THE COMMERCIAL PRACTICE 90-91 (1965).

In 12 AM. JUR. TRIALS 250-251 it is stated:

"Sec. 46. Contempt

While imprisonment for debt is rarely allowed imprisonment for contempt of court is an accepted punishment. Failure to comply with an order to appear for examination in a supplementary proceeding may be punished as a contempt of court . . .

The secret of successful collection is to make the payment of the debt less onerous to the debtor than some alternative. Few debtors conceal assets, or refuse to pay when they have the ability to do so, if imprisonment is the only alternative." *Id.*

In 12 AM. JUR. TRIALS at 252 it is stated:

"There are statutory provisions in some jurisdictions that authorize courts to order the judgment debtor to make periodic payments to the creditor in reduction of a judgment . . .

A very important aspect of required installment payments is the psychological effect on the debtor. If he fails to make the payments after a court order to do so he may be adjudged guilty of contempt (see Sec. 46, *supra*)." *Id.*

[129] See CONSUMERS IN TROUBLE, *supra* note 2 at 196. Although New York City requires that summonses arising out of consumer credit transactions must include a Spanish translation, N.Y. CITY

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language.[120] Alderman found that the contempt procedures and papers he examined were "ineffective to inform the low income debtor either of the reason for the punishment or of what steps he could take to alleviate it." 24 SYRACUSE L. REV. at 1238. Alderman elaborated:

> "The basic weakness of the show cause hearing appeared similar to those affecting adjudication on the merits: the lack of sufficient protections to insure proper service, and the complicated nature of the document served. Only 24 of the subjects stated they were served with a show cause order. If effectiveness of service is to be measured, this number must be further reduced, since of the group who admitted being served, only 18 expressed knowledge sufficient to con-

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CIV. CT. ACT Sec. 401(d) (McKinney Supp. 1973), "the translation is apparently as legalistic as the English original, and the typical Spanish-speaking consumer would probably have difficulty understanding it." Note, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J. OF L. SOC. SCI. 370, 385 n. 60 (1974). There are Spanish speaking residents of New York outside New York City. There are other linguistic groups in New York City and settled elsewhere in the state. There is a large Italian speaking population upstate but particularly in Utica.

[120] See CONSUMERS IN TROUBLE, *supra* note 2 at 207-210. Caplovitz compared the wording of the summons in Chicago, Detroit and New York and commented that greater failure to respond to the summons in New York could be related to its language:

> "A comparison of the summonses used in Chicago, Detroit, and New York calls attention to yet another possible reason for the failure of New York debtors to respond. In both language and typeface, the New York summons is much more difficult to understand than those used in Chicago and Detroit. In the latter cities, key parts of the summons appear in large boldface type, set off from other parts, whereas in New York, the essential points are lost in legal verbiage." *Id.* at 207.

The Caplovitz study revealed that whereas only 4 percent of those debtors who were served in New York appeared in court, the percentage was substantially higher in Chicago, 36 percent, and Detroit 34 percent. *Id.* at 204.

> vince the interviewer that they understood what the order meant. As was expected, the subjects had a great deal of difficulty understanding the lengthy document. The failure of the present system properly to inform the judgment debtor of his legal rights is even more significant in light of the fact that 37 of the subjects appeared to have what the study team believed to be a valid defense, and that had they appeared, they might well have escaped punishment. (Few, if any, of the persons who appear are ever fined.)" *Id.* at 1238.

Of the 40 persons fined for contempt who were interviewed in the Alderman study, 14 did not know they were being sued, 18 did not know that a judgment had been entered against them, and 17 denied receiving an information subpoena in the mail. *Id.* at 1253. Alderman notes that among the reasons for "confusion on the part of the debtor is the overwhelming amount of paper which he receives and the difficulty encountered by the layman in understanding legal documents." *Id.* at 1234. He adds: "When shown a copy of a summons, the subject may have recalled receiving it; however, the fact that he did not know he had been sued demonstrates the failure of the present system to provide meaningful notice to the debtor." *Id.* at 1234.[121]

(ii) Confusion Concerning Proper Response To Papers Served

Many debtors, particularly those who are indigent, find legal procedure confusing. David Caplovitz found that inappropriate responses to the summons and complaint were a factor leading to default judgments in consumer credit actions.[122] Alderman found a similar pattern in debtor

[121] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 191-224; *Due Process Denied*, *supra* note 48 at 382-388, 413.

[122] CONSUMERS IN TROUBLE, *supra* note 2 at 204, 215-16, 222-224.

responses to the variety of papers served during the post-judgment collection process:

> "Many subjects had specific excuses for their defaults other than ignorance. One of the most common of these was that they had contacted the office of the creditor's attorney and believed that he had 'taken care' of everything. Subjects repeatedly stated that they were arranging for payment with the creditor's attorney, or that they had telephoned his office and were told not to appear in court. In one case, the subject appeared in court on the scheduled date, but the creditor's attorney failed to appear. This judgment debtor then contacted the creditor's attorney to ask about the adjournment date and was informed that as long as he paid a set amount each week, there was nothing to worry about. Two weeks later, in spite of payment, the debtor was adjudged in contempt, fined, and ordered committed to jail." 24 SYRACUSE L. REV. at 1238.

The pattern of harassment through multiple adjournments observed by the Civil Court for the City of New York in *Uni-Serv Corporation* v. *Batyr, supra,* and described above[133] resembles, in some respects, the instance reported by Alderman. The circumstances in appellee Ward's case described at pages 54-56 of the appellees' brief again present a similar pattern. Ward appeared in court in response to the subpoena directing him to appear to be examined for assets. The attorney for the creditor was not present. Ward went to the attorney's office and informed him that he would answer the questions in court but not in the attorney's office. The contempt process was then initiated. Later, Ward arranged to pay $10 a week to satisfy the judgment, made payments, but ceased pay-

[133] For discussion of *Batyr* see footnote 119 and accompanying text, *supra.*

ing upon losing his job. The contempt process was then pressed.[134]

Alderman notes that confusion concerning the appropriate method for responding to a subpoena or an order to show cause was but one example of a general pattern of ignorance on the part of the judgment debtor.[135]

> "While several of the subjects had stories similar to those above, the prevailing causes of the debtor's al-

[134] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 204:

> "By far the most common reason for not appearing in court in each jurisdiction (ranging from one third of the Chicago cases to one fifth of the New York cases) is that the debtor, presumably stimulated by the initiation of the lawsuit, has arranged for some kind of settlement with the creditor's attorney. These debtors are of the impression, often mistaken, that the court action has been discontinued."

[135] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 205 where Caplovitz sets forth the following table:

Table 11.6 / Reasons for Not Appearing in Court in Response to the Summons, by City (percent)

	Chicago	*Detroit*	*New York*
Tried to settle and thought court action was discontinued	33	28	21
Advised not to go to court by plaintiff's attorney or own attorney	13	13	9
Thought debt settled and did not owe more money	5	6	10
Unable to go; sick or could not afford loss of day's pay	16	8	12
No particular reason; forgot	10	14	11
Couldn't pay; no defense	7	14	8
Received summons too late to go to court	4	3	3
Did not know that he was supposed to go to court	3 } 4	6 } 7	15 } 19
Afraid to go to court	1 }	1 }	4 }
Total percent	92	93	93

[a] The percentages do not total 100 because we have omitted a miscellaneous category as well as the "no answer" cases.

leged obstinance appeared to be lack of intelligence and fear of the legal process involved. Few, if any, of the persons interviewed understood why they had been fined, and none stated that they knew how to prevent it. Most of the subjects believed that the fine was levied to force payment of the debt and that the sheriff was there to collect. Even welfare recipients, who could not legally be forced to pay any part of the debt while receiving public assistance, paid the sheriff rather than go to jail, often borrowing money in order to pay the sheriff and thereby perpetuating their indebtedness." 24 SYRACUSE L. REV. at 1238-1239.

(iii) The Initial Failure To Obtain Representation And Respond To The Summons And Complaint

The initial failure to obtain representation[136] and respond to the summons and complaint sets a pattern which continues from the initiation of the action to default judgment and, in some cases, to the fine or commitment to jail for contempt of court. The problem of imprisonment for debt must be seen as part of a larger social problem vividly illustrated by the overwhelming percentage of default judgments in consumer credit actions.

As stated above, the vast majority of consumer credit actions in New York and throughout the country end in

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[136] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 222-224. Caplovitz explains:

> Closely related to the failure of debtors to have their day in court and their legal rights protected is the irony that law suits against consumers generally involve sums of money that are smaller than the amounts the debtor would have to pay a lawyer to protect his rights. CONSUMERS IN TROUBLE, *supra* note 2 at 222.

default judgments.[137] In the case now before the Court, appellees Vail, Ward, McNair, Hurry, Nameth, Humes and Harvard had default judgments taken against them.

A debtor who is unrepresented by counsel at the outset of a consumer credit action is likely to make mistakes after judgment which could form the basis for fining him for contempt of court and committing him to jail. The appointment of counsel by the state when commitment of an indigent to jail appears as a plain possibility would enable the judgment debtor to avoid some of these mistakes.[138]

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[137] *Staff Report, supra* note 23 at 116. Caplovitz indicates that over 90% of New York City consumer actions result in default judgments. CONSUMERS IN TROUBLE, *supra* note 2 at 221. One study of 23 New York City collection attorneys revealed that in one 3-month period, 15 of the 23 obtained default judgments in 100 percent of the consumer lawsuits they initiated. Another attorney ". . . estimated that he initiated 7,000 lawsuits annually of which 90% resulted in default." *Staff Report, supra* note 23 at 164-165. A study of two New York City retail furniture stores revealed that in 1971 they alone accounted for 831 default judgments. Note, *Due Process Denied, supra* note 48 at 371 n. 11. Alderman's study of imprisonment for debt in Onondaga County revealed that most of the judgments won by creditors in the cases studied were by default. *Imprisonment for Debt, supra* note 49 at 1225.

[138] See *Argersinger* v. *Hamlin*, 407 U.S. 25 at 33 where the Court stated:

> "The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more."

IV. Use Of The Contempt Process In The Supplementary Proceedings Stage In New York Domestic Relations And Consumer Credit Cases Has Undesirable Consequences.

The outline of the collection process beginning with presuit extra legal collection methods, followed by the initiation of legal action by summons and complaint and continuing through the supplementary proceedings stage which includes in some instances the use of contempt and imprisonment for debt has revealed a series of social problems. The social problems giving rise to default judgments in consumer credit actions are not separable from those leading to fines and imprisonment for contempt of court during the supplementary proceedings process. One can locate, however, some distinct undesirable consequences of the use of contempt at this latter stage:

A. Use of the contempt procedure coupled with the information subpoena or the subpoena to appear for examination as to assets allows the collection of the debt itself rather than the acquisition of information. The contempt power of the court by this means is made part of the collection process.[139]

B. Use of the contempt procedure coupled with the installment payment order, the information subpoena or the subpoena to appear for examination as to assets allows

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[139] See R. GOLDFARB, THE CONTEMPT POWER, 292-93 (1963) where it is stated:

> "[c]ontempt should not be generally extended to cover, as it has been, situations where the only aim is to perfect a private litigated right. To do so results in a theoretical bastardization of the true contempt and often an unfair misapplication of penal powers. Only when all methods of ordinary civil execution have failed, and an individual's recalcitrance has gone to the point of positive interference with government, should the broad and powerful contempt sanction be applied."

collection of the debt in a lump sum[140] rather than by periodic payments as under garnishment (income execution) or the installment payment order absent a fine for contempt. When used against indigent or near indigent debtors this process will impose a heavy burden.[141]

C. Use of the contempt procedure coupled with the information subpoena or the subpoena to appear for examination as to assets allows collection from indigents and from those in receipt of salaries less than the floor found in the New York income execution provisions[142] or the Federal Anti-Garnishment Act.[143] Collection has been successfully attempted by this process against those in receipt of public assistance.[144]

V. Use Of The Contempt Process In the Post-Judgment Collection Stage In New York Domestic Relations And Consumer Credit Cases Violates The Due Process Clause Of The Fourteenth Amendment

The Consumer Protection Board relies upon the arguments made in appellees' brief to demonstrate that the contempt procedures followed in appellees' cases in state court were constitutionally deficient under the due process clause of the 14th Amendment. The Board should, however, repeat its contention that these procedures and the contempt procedures followed elsewhere in New York in

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[140] This might occur even where a bailable attachment under JUDICIARY LAW § 757(2) is employed as in the Civil Court for the City of New York.

[141] *See Imprisonment for Debt, supra* note 49 at 1239.

[142] N.Y. CPLR § 5231 (McKinney 1963).

[143] Federal Consumer Credit Protection Act, 15 U.S.C.A. §§ 1671-1677 (1974).

[144] See note 33, *supra*, and the facts of this case.

domestic relations and consumer credit actions with the exception of proceedings in Family Court under the FAMILY COURT ACT are unconstitutional because:

A. The subpoenas employed and the order to show cause why the accused should not be punished for contempt do not provide notice of the possibility of fine or imprisonment.[145]

B. The failure to use the warrant of attachment procedure found in JUDICIARY LAW Section 757(2) before the issuance of a commitment order denies a hearing at a crucial point in the proceedings.[146] The JUDICIARY LAW plainly permits the practice followed in appellees' cases in the state courts in Dutchess County and in most of the other courts discussed.[147] Debtors may be imprisoned under these procedures for 90 days without ever being physically present before the court.

C. Indigent debtors may be imprisoned by these procedures without being offered the assistance of assigned counsel.[148]

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[145] *Lynch* v. *Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

[146] *Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970). The desirability of this procedure for the purpose of satisfying the due process clause is recognized by the Attorney General at page 23 of his brief.

[147] The Civil Court for the City of New York, however, employs the warrant of attachment at the appropriate point in its procedure.

[148] *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

VI. The Due Process Requirements Mandated By The Three-Judge Court Are Feasible. The Requirements Of Notice Of Potential Fine And Imprisonment, Physical Presence Of The Debtor Accused Of Contempt Of Court At A Hearing, And The Assignment Of Counsel Are Practicable To Implement.

It is feasible to cure the violations of the due process clause of the 14th Amendment just described: (*i*) By requiring subpoenas employed in the effort to discover assets and orders to show cause issued in contempt proceedings, to warn the debtor clearly of potential fine and imprisonment; (*ii*) by requiring the physical presence of a judgment debtor accused of contempt at a hearing before he is incarcerated; and (*iii*) by requiring assignment of counsel to indigent judgment debtors accused of contempt.

(i) Clear Notice

Creditors can easily modify their forms to provide subpoenaed judgment debtors with clear notice of the consequences of not responding to the subpoena. Such notice would afford the judgment debtor some opportunity for distinguishing between these subpoenas and the large number of other papers received in the collection process. Studies of legal process reveal that greater clarity would lead to a larger number of responses which would include responding by judgment debtors to information subpoenas or subpoenas to appear for examination as to assets.[149]

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[149] *See Consumers in Trouble, supra* note at 201-211.

A comparison of the summonses used in Chicago, Detroit, and New York calls attention to yet another possible reason for the failure of New York debtors to respond. In both language and typeface, the New York summons is much more difficult to understand than those used in Chicago and Detroit. In the latter

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(ii) Presence At A Hearing

The Attorney General recommends (appellant's brief p. 23) that in a contempt proceeding a court first issue an order to show cause under JUDICIARY LAW, Section

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cities, key parts of the summons appear in large boldface type, set off from other parts, whereas in New York, the essential points are lost in legal verbiage. Moreover, in both Chicago and Detroit, the time for responses is the same whether personal or substitute service was made and therefore there is no ambiguity as to when the debtor should respond. In contrast, the New York summons tries to explain the difference in response time according to method of service. *Id.*, at 207.

These differences are apparent when the actual language that appears on the summonses is examined. In all three cities, the summonses are headed by the name of the court in which they are issued, followed by the names and addresses of the plaintiff, defendant, and plaintiff's attorney, the date at which the summons was issued or served, and, in Chicago and Detroit, the signature of the court clerk. (This does not appear on the New York summons because service of summons is not a court responsibility in New York.) For present purposes, the critical parts of these summonses are their communications addressed to the defendants. In Chicago, the language of the summons differed according to whether the suit was an open one or one based on a confession-of-judgment contract. Since the Chicago sample was based exclusively on the confirmation-of-judgment book, the appropriate summons is the one served on debtors who had signed confession-of-judgment contracts. *Id.*, at 208.

The communications to the debtor-defendant in this summons are contained in but three sentences or parts, the first of which contains 91 words, the second, about personal service, 29 words, and the third, about substitute service, 67 words. (Actually the second and third constitute a single sentence.) The long first sentence contains three messages: first, it tells the debtor that he is being summoned to court; second, it tells him the address of the court; and third it tells him that if he fails to appear, he will be subjected to a default judgment for the "relief demanded in the complaint." Unlike the summonses in Chicago and Detroit, these vital messages all appear in the same lowercase typeface within a single sentence. It talks about "the time period provided by law as noted below," about the complaint "which is annexed hereto," and about "relief demanded in the complaint, together with the costs of this action." A summons so designed is hardly apt to

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757(1) and then if the Judgment Debtor does not appear, use the warrant of attachment under New York JUDICIARY LAW Section 757(2) to bring the debtor before the court. Use of the warrant of attachment in this manner would eliminate the instances where a judgment debtor is committed to jail for up to 90 days without ever being physically present at a hearing in court. It would conform the contempt process to the normal criminal law procedure which requires arraignment after an accused is apprehended.

The procedure recommended by the Attorney General is presently required in family court, FAMILY COURT ACT, Sections 453, 454.[150] This procedure is also employed in several courts of the Civil Court of the City of New York in contempt proceedings. *Sure Fire Fuel Corp.* v. *Martinez, supra.*[151]

Requiring a creditor's attorney who wants to imprison a judgment debtor to request the court to issue a warrant of attachment rather than a commitment order would not overburden public officials.[152] Requiring the sheriff or

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communicate with the typical debtor, who tends to be rather poorly educated; moreover, it falls far short of the clarity of the summonses in the other two cities. *Id.*, 209.

See also, Press Release, Citibank Public Affairs Department, July 16, 1976, indicating that consumers "are more apt to defend themselves in court if they receive a summons which includes a post card answer, a three-month experiment conducted jointly by Citibank and Justice Edward Thompson, Administrative Judge of the City of New York Civil Courts, has revealed." Also reported in *Use of Post-Card Reply Format Found to Cut Default Rate in Citibank Suits,* 174 N.Y.L.J. 1 (August 3, 1976).

[150] For discussion of procedure required by the Family Court see notes 114-115 and accompanying text, *supra.*

[151] For discussion of the procedure employed by the Civil Court of the City of New York, see notes 116-121 and accompanying text, *supra.*

[152] For the discussion of the revised Maine procedure, see note 108, *supra.*

deputy sheriff to bring the debtor to court under a warrant of attachment would not impose a significantly greater burden on him than bringing the debtor to jail under a commitment order.[153]

(iii) Assignment of Counsel

Assignment of counsel when a judgment debtor accused of contempt is indigent and unrepresented and when there is a reasonable likelihood that he will be imprisoned[154] or suffer other serious consequences should outweigh any burdens to the State.[155]

In similar circumstances, assignment of counsel is now required in Family Court by FAMILY COURT ACT, Section 262. See *Rudd* v. *Rudd, supra.*

The instances in which it would be proper to compel an indigent to pay or to testify concerning his assets by imprisoning him should be few in number because an indigent debtor, by definition, is unable to pay debts and does not possess any significant assets.

One potential procedure in contempt cases which would comply with the requirements of due process would be:

1. Issuance at the judgment creditor's request of an order to show cause under N.Y. JUDICIARY LAW Section 757(1);

2. If the judgment debtor does not appear in response to the order to show cause, issuance at the judgment creditor's request of a warrant of attachment under N.Y. JUDICIARY LAW Section 757(2);

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[153] A deputy sheriff who apprehends a debtor under a warrant of attachment would have no obligation to remain to testify at the hearings. In this respect, the burdens on the sheriff's office will differ significantly from the burden in a criminal arrest.

[154] *See Argersinger, supra,* at 37.

[155] *See Argersinger, supra,* at 47, 48 (Powell, J., concurring).

3. A requirement that the attorney for the judgment creditor at the time the warrant of attachment is requested, must specify whether he is seeking a fine and imprisonment; and

4. A requirement that counsel be assigned at the time the warrant of attachment is issued, if it appears reasonably probable that the debtor is indigent[156] and the creditor's attorney is seeking a fine or imprisonment.[157]

Use of this procedure would not preclude assignment of counsel when the judgment debtor is brought before the court by warrant of attachment if he then appears to be indigent. Nor would use of this procedure preclude a creditor's attorney from requesting fine or imprisonment if a judgment debtor brought before the court by warrant of attachment commits a new contempt in the court's presence by refusal to answer questions.[158]

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[156] Circumstances which create a presumption of indigency, such as receipt of public assistance, are often a matter of public record as in the case of appellees Vail, McNair, Nameth, Humes and Harvard. In other circumstances, the creditor's attorney will have information concerning indigency which he will furnish to the court if pressed or if it becomes routine practice to furnish such information. The creditor's attorney may know from examination of public records that the debtor owns no real property in the jurisdiction, that his automobile, if any, is subject to a security interest, and in some jurisdictions the amount of personal property taxed during the previous year. The creditor's attorney may have information concerning employment of the debtor including loss of a job. The attorney in appellee Ward's case knew of loss of employment.

In domestic relations cases, a spouse seeking enforcement of a support order may be well informed concerning the employment status of the debtor. Such information should be made available to the court before the warrant of attachment is issued.

[157] *See* discussion of bill passed by New York Legislature and subsequently withdrawn, *infra,* at n. 167, 165.

[158] The judge himself need not preside over the examination of a debtor willing to reply to questions concerning assets when brought to court under a warrant of attachment. The examination could be conducted either informally or, more formally by someone appointed for that purpose by the court. The person appointed could be the attorney for the creditor.

A procedure such as this would satisfy the concern for due process of law and feasibility expressed by the opinions in *Argersinger, supra.*[159] Whenever a judgment creditor is seeking to fine or imprison an indigent, there will probably be "complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel."[160] *Id.*, at 47 (Powell, J., concurring). The consequences of fine or imprisonment to an indigent will be "of sufficient magnitude not to be casually dismissed.[161] *Id.*, at 48 (Powell, J., concurring). The creditor will be represented by counsel. See *Argersinger, supra* at 49, 64 (Powell, J., concurring).

The number of cases in which a creditor's attorney will seek to fine or imprison an indigent under this procedure will probably be small. An indigent debtor who did not respond to the subpoena or order to show cause because of inability to read or understand the relevant papers or because of confusion concerning the court process will probably respond to questions when brought to court by warrant of attachment.[162] An indigent debtor who has not made payments under an installment payment order because of lack of funds or loss of employment will explain

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[159] *See Argersinger, supra,* at 42 (Burger, C.J., concurring), where it is stated: "[t]he judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own. This need to predict will place a new load on courts already overburdened and already compelled to deal with far more cases in one day than is reasonable and proper. Yet, the prediction is not one beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer."

[160] These will include issues of intent, willfulness and state of mind. The elaborate background supplied in this brief will also be relevant to the judge's understanding of the problem. See also appellees' brief at —— n. ——.

[161] The consequences of a fine to an indigent debtor who, by definition will find it difficult to pay, will be either meaningless or will be backed by the threat of imprisonment.

[162] *See Imprisonment for Debt, supra* note 49, at 1229, 1235.

his difficulty when brought to court by warrant of attachment.[163] In such circumstances, it may be appropriate for the judgment creditor to seek a further order or agreement to pay; it will not be appropriate to fine or imprison the debtor.[164]

If the impact of a requirement that counsel be assigned in appropriate circumstances to indigents accused of contempt[165] is to reduce the number of such proceedings, that will be a desirable result. The contempt power of the courts should be used to protect the dignity and authority of the court and not to serve the convenience of private parties.[166]

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[163] *See, id.*, at 1229, 1235, 1237, 1239.

[164] For discussion of *Sure Fire*, and other City Court installment payment order cases, see notes 116-121 and accompanying text, *supra.*

[165] *See*, appellees' brief at 39, fn. 58, wherein there are listed the states in which an alleged civil contemnor must be brought before the court. *See also*, appellees' brief at 27, fn. 33, wherein there are listed the states in which an alleged civil contemnor must be assigned counsel.

[166] *See* R. Goldfarb, *The Contempt Power* at 292, 293 (Columbia University Press 1963). Goldfarb states:

> "[r]eference . . . to the historical nature of contempt power indicates that in any event, contempt of any kind or classification could historically only be a governmental power to be used essentially for governmental purposes, any private aspects notwithstanding. This is incontrovertible fact and history. If the purpose of civil contempt departs from this quality, it is contempt in name alone." *Id.*, at 58.

See also, Imprisonment for Debt, supra note 49, at 1243 n. 86, 1244 n. 88; and Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 272, 273 (1971).

VII. Abstention Is Inappropriate And Would Cause Confusion And Incalculable Delay In Resolving The Constitutional Deficiencies In The Challenged Contempt Process

The Consumer Protection Board relies upon the arguments made in appellees' brief to demonstrate that abstention is inappropriate in this case. The Board repeats in summary the appellees' position on abstention:

1. Comity and federalism permit federal courts to enjoin pending state court civil proceedings.

2. Comity and federalism demand intervention in court proceedings and the federal court should not defer to private litigants.

3. The consequences of non-intervention in civil proceedings will disrupt comity and federalism and impose an unwarranted limitation on the power of the federal courts.

4. Intervention is appropriate as the state court remedy is inadequate.

5. Intervention is appropriate where the statutes are flagrantly and patently unconstitutional.

6. Intervention is appropriate where civil contempt proceedings are utilized in bad faith.

7. The three judge court correctly decided to rule on the issues because the contempt statutes are clear and the state courts have already constructed the applicable statute.

A. The New York State Legislature And The Governor Are Both Waiting For This Case To Be Decided Before Acting On Any Legislative Modifications Of The Challenged Contempt Statutes

The New York State Legislature responded quickly to the Federal District Court Decision in this case.[167] The proposed legislation to remedy the constitutional defects in the contempt process passed both houses of the NYS Legislature;[168] however, the bill was recalled from the Governor on July 20, 1976, on account of this appeal.[169] The Counsel for the State of New York Office of Court Administration disclosed the putative reasoning:

> "The decision in *Vail* is presently before the United States Supreme Court, and we feel that it would be inappropriate for the Legislature to undertake a substantial revision of the New York contempt statutes until the Supreme Court has had an opportunity to express itself on the important issues involved. Approval of this bill might effectively moot the controversy raised in *Vail* and thereby deprive the Supreme Court of that opportunity . . .

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[167] The three judge court rendered its decision on January 7, 1976. A bill to cure the constitutional deficiencies in the contempt statutes was introduced in the New York State Senate on February 26, 1976.

[168] AN ACT to amend the judiciary law, the family court act and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto. Assembly 10319, passed April 13, 1976, repassed June 29, 1976, Senate 21063, passed June 29, 1976. Key provisions of this bill are set forth in Appendix A.

[169] Letter of Mark E. Watkins, Esq., Counsel to the Assembly Committee on Judiciary, to Rosemary S. Pooler, Executive Director of the State Consumer Protection Board, September 22, 1976; Letter of Hon. John S. Thorp, Jr., Nassau County Court Judge and then-sponsor (as Assemblyman) of the bill, to Rosemary S. Pooler, September 23, 1976. See Appendix B.

> . . . We believe that the public interest will be best served by awaiting a definitive decision by the United States Supreme Court."[170]

Therefore, the Legislature and the Governor have deferred any legislative actions until this Court decides the constitutionality of the challenged contempt process.

The legislation passed by both houses of the State Legislature contained provisions for clear, vivid notice, for bringing the judgment debtor physically before the Court prior to commitment to jail, and for assigning counsel to the indigent debtor. Abstention on these issues will delay any action by the Legislature because of the absence of any definitive ruling.[171]

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[170] Letter of Michael R. Juviler, Esq., Counsel to the (N.Y.) Office of Court Administration to Judah Gribetz, Esq., Counsel to the Governor, July 20, 1976. See Appendix B.

[171] Compare the conclusion in respect to states generally of the Report of the National Commission of Consumer Finance (1972) at p. 32:

> "in several states debtors are still imprisoned for failure to pay their debts but the basis for incarceration is contempt of court for failing to obey the court's order to pay the debt.
>
> *No creditor should be permitted to cause or permit a warrant to issue against the person of the debtor with respect to a claim arising from a consumer credit transaction. In addition, no court should be able to hold a debtor in contempt for failure to pay a debt arising from a consumer credit transaction until the debtor has had an actual hearing to determine his ability to pay the debt.*
>
> As a matter of public policy, if imprisonment for debt still exists in any form, the Commission recommends its abolition. However, if after final judgment, and after notice and actual hearing and any other necessary procedural safeguards, a court has reasonably determined that the debtor has refused to pay a court-ordered sum when he has capacity to do so, the court should be able to initiate contempt proceedings."

B. Two State Agencies, The New York State Consumer Protection Board And The New York State Department of Law, Taking Opposite Positions In This Case Does Not Warrant Abstention

The Attorney General of New York is representing the appellants herein and, the Board is informed,[172] defending the constitutionality of the contempt statutes pursuant to Section 71 of the New York Executive Law and his constitutional duty. The New York State Consumer Protection Board is cooperating with and assisting in this class action pursuant to Section 553(3)(c) of the New York State Executive Law. The agencies are performing separate functions to facilitate full deliberation of the issues in this case and do not represent different interpretations of state law but, instead, different interpretations of the Constitution.

Conclusion

The New York State Consumer Protection Board, as Amicus, urges that the judgment of the District Court be affirmed on the ground that the challenged contempt process is in violation of the due process clause of the Fourteenth Amendment.

Respectfully submitted,

CARL G. DWORKIN, Esq.
HAROLD I. ABRAMSON, Esq.
Attorneys for the New York State Consumer Protection Board[173]

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[172] In a letter received on September 29, 1976, First Assistant Attorney General Samuel A. Hirshowitz so stated to the Board.

[173] The New York State Consumer Protection Board would like to acknowledge the invaluable and substantial assistance in preparing this brief provided by Professor Samuel J. M. Donnelly of the Syracuse University College of Law and the assistance provided by Michele F. Febie, third-year student at the Syracuse University College of Law.

Appendix A

AN ACT

to amend the judiciary law, the family court act and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto

. . .

§ 756. Application to punish for contempt; procedure. An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred fifty of the civil practice law and rules or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT . . .

§ 770. Final order directing punishment; exception. Upon the return of an application to punish for contempt, or upon a hearing held upon a warrant of commitment issued pursuant to section seven hundred seventy-two or seven hundred seventy-three, the court shall inform the offender that he has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him. . . .

Where an application is made to punish an offender for an offense committed with respect to an enforcement procedure under the civil practice law and rules, if the offender appear and comply and satisfy the court or a judge before whom the application shall be pending that he has at the time no means or property or income which could be levied upon pursuant to an execution issued in such an enforcement procedure, the court or judge shall deny the application to punish the offender without prejudice to the applicant's rights and without prejudice to a renewal of the application upon notice and after proof that the financial condition of the offender has changed. . . .

Except as hereinafter provided, the offender may be committed upon a certified copy of the order so made, without further process. Where the commitment is ordered to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and the defendant has not appeared upon the return of the application, the final order directing punishment and commitment of the offender shall include a provision granting him leave to purge himself of the contempt within ten days after personal service of the order by performance of the act or duty the omission of which constitutes the misconduct for which he is to be punished, and the act or duty to be performed shall be specified in the order. Upon a certified copy of the order, together with proof by affidavit that more than ten days

have elapsed since personal service thereof upon the offender, and that the act or duty specified has not been performed, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such further disposition as the court in its discretion shall direct. . . .

If a fine is imposed to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and it has not been shown that such an actual loss or injury has been caused and the defendant has not appeared upon the return of the application, the order imposing fine, if any, shall include a provision granting the offender leave to purge himself of the contempt within ten days after personal service of the order by appearing and satisfying the court that he is unable to pay the fine or, in the discretion of the court, by giving an undertaking in a sum to be fixed by the court conditioned upon payment of the fine plus costs and expenses and his appearance and performance of the act or duty, the omission of which constitutes the misconduct for which he is to be punished. The order may also include a provision committing the offender to prison until the fine plus costs and expenses are paid, or until he is discharged according to law. Upon a certified copy of the order imposing fine, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the fine plus costs and expenses has not been paid, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for

such other disposition as the court in its discretion shall direct. . . .

3. The respondent shall not be committed to jail pursuant to this section unless the court makes an order requiring such respondent to show cause at a time and place specified therein why he shall not be punished for contempt for his failure to obey any such lawful order. Such order to show cause shall be personally served upon the respondent and shall contain a clear statement of the purpose of the hearing and a warning that failure to appear may result in contempt of court and imprisonment in accord with the notice provision of section seven hundred fifty-six of the judiciary law.

§ 13. This act shall take effect immediately.

Appendix B

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

[EMBLEM]

ARTHUR J. COOPERMAN
27TH DISTRICT
QUEENS COUNTY

CHAIRMAN
COMMITTEE ON JUDICIARY

REPLY TO:

☐ DISTRICT OFFICE
80-32 164TH STREET
JAMAICA, NEW YORK 11432
297-4468

☐ ALBANY OFFICE
ROOM 844
LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12248

September 22, 1976

Hon. Rosemary S. Pooler
Executive Department
State Consumer Protection Board
99 Washington Avenue
Albany, New York 12210

Dear Ms. Pooler:

In response to your inquiry of September 16, 1976, concerning A-10319, the bill was recalled at the request of the Governor's Counsel. The Counsel's office took the position that since an appeal of the *Vail* decision is now pending before the United States Supreme Court, any legislative action would be premature.

For your information, Mr. Thorp is now a Judge of the Nassau County Court and has been succeeded as Chairman of the Judiciary Committee by the Honorable Arthur J. Cooperman.

Very truly yours,

MARK E. WATKINS
Mark E. Watkins
Counsel

MEW/ls

CHAMBERS OF THE COUNTY COURT
COUNTY OF NASSAU
MINEOLA, N. Y. 11501

September 23, 1976

Ms. Rosemary S. Pooler
Executive Director
State Consumer Protection Board
99 Washington Avenue
Albany, N. Y. 12210

Dear Ms. Pooler:

I am writing in reply to your letter of September 16th relative to the bill which I sponsored, A10319, which reforms the procedures for the civil punishment of contempt.

This bill was recalled from the Governor at the request of the office of his Counsel. It is my recollection that they believed the legislation was premature in view of pending appeals in the cases to which you refer.

Since I am no longer a Member of the Assembly and you might require further information, I would respectfully refer you to Mark Watkins who is a member of the Assembly Central Staff and who was the primary drafter of this legislation.

Sincerely,

JOHN S. THORP, JR.
JOHN S. THORP, JR.
COUNTY COURT JUDGE

JST:eb

Appendix C

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 Broadway
New York, New York 10007

(Emblem)

RICHARD J. BARTLETT
State Administrative Judge

MICHAEL R. JUVILER
Counsel

July 20, 1976

Honorable Judah Gribetz
Counsel to the Governer
Executive Chamber
The Capitol
Albany, New York 12224

Re: A. 10319

Dear Mr. Gribetz:

This will acknowledge receipt of your request for comment on the above-designated legislation.

This bill would repeal and replace numerous sections of the Judiciary Law and Domestic Relations Law, in relation to procedures for the imposition of punishment for civil contempts of court. It is designed to conform with due process standards announced by a three-judge constitutional court in the case of *Vail* v. *Quinlan* (N.Y.L.J., Jan. 16, 1976, p. 1, col. 6 [S.D., N.Y.]).

The Office of Court Administration takes no position on the merits of the bill, but recommends disapproval.

The decision in *Vail* is presently before the United States Supreme Court, and we feel that it would be inappropriate for the Legislature to undertake a substantial revision of the New York contempt statutes until the Supreme Court

has had an opportunity to express itself on the important issues involved. Approval of this bill might effectively moot the controversy raised in *Vail* and thereby deprive the Supreme Court of that opportunity.

Disapproval of this measure will not adversely affect court administration. The *Vail* decision has been stayed pending its review by the Supreme Court. Consequently, the statutes to be repealed by this bill are still in effect and we perceive no need for interim legislation. We believe that the public interest will be best served by awaiting a definitive decision by the United States Supreme Court.

Very truly yours,

MICHAEL R. JUVILER
Michael R. Juviler

MRJ/FM/dbm